INTRODUCTION

This issue of our Newsletter covers a number of different topics that are important for trade unions and their members.

As always, please feel free to contact us with any questions you may have in relation to any of the topics covered in this Newsletter.

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A. DUAL UNIONISM IN THE CONSTRUCTION INDUSTRY

Douglas Wray and Maeve Clougherty

Section 5 of the Ontario *Labour Relations Act* (the *"Act")* states:

> "Every person is free to join a trade union of the person's own choice and to participate in its lawful activities."

Section 51(2) of the *Act* states that a trade union cannot require an employer to discharge an employee under a union shop provision in a collective agreement because the employee has been expelled or suspended from membership in the trade union for the reason that the employee:

> "....
>
> (c) was or is a member of another trade union;
>
> (d) has engaged in activity against the trade union or on behalf of another trade union;
>
> ...."

The effect of these provisions is clear. Let's assume an employee covered by a union shop collective agreement between Union A and his/her employer joins and attempts to sign up his/her co-workers in Union B with a view to assisting Union B bringing a raid or displacement application. If Union A expels or suspends the person from membership based on this conduct, they cannot require the employer to discharge the person.

Sections 5 and 51(2) of the *Act* apply to all employees (and trade unions) covered by the Act, including construction industry employees and trade unions.

However, most employment in the construction industry is fundamentally different than in most other industries. Members of construction industry trade unions may not remain employed long term by a single employer. Rather, members often look to their union for work, either to be sent out to work through the hiring hall or at least to obtain a referral slip. In both cases, the individual will generally be required to be a member in good standing in order to obtain work under the trade union's collective agreement.

Sections 5 and 51(2) of the *Act* may prevent a construction trade union from requiring an employer to discharge an existing employee who had been expelled or suspended from membership by reason of the individual joining a competing trade union.

But what if the construction trade union either threatens or actually expels a member because he/she joins a competing trade union and is advocating other members to do likewise – where the effect would not be loss of an existing job, but rather loss of future job opportunities? Section 51(2) does not apply because it only refers to the protection of existing employees.

Two recent cases at the Ontario Labour Relations Board have dealt with this issue and whether the conduct is caught by Section 76 of the *Act*, which reads:

> "76. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act."

The first case involved an individual named Dave Garcia and Labourers' International Union of North America, Local 1059, in London, Ontario. Garcia had been a member of Labourers' Local 1059. He decided to join Local 1946 of the Carpenters' Union and was working with EllisDon under a Carpenters' Collective Agreement. The Labourers' Union adopted a policy against dual unionism which provided that no member of Local 1059 can also be a member of any affiliate of the Carpenters' Union. Local 1059 charged Mr. Garcia under this policy and he was expelled from Local 1059. The Carpenters' Union filed an unfair labour practice complaint pursuant to Section 96 of the *Act* against Local 1059, alleging that Local 1059 had violated Section 76 in its actions against Mr. Garcia.

In a decision dated February 2, 2012, the Board held that there was no *prima facie* case for the claim that the Labourers by requiring Mr. Garcia either to give up his membership with the Carpenters and as a result relinquish his employment with EllisDon or have his membership and associated benefits in the Labourers terminated, violated the *Act*.

The Board issued a further decision in the Garcia case dated May 17, 2013 written by the Chair of the Board.

A second case dealing with dual unionism in the construction industry involved James Watson et al., Brick and Allied Craft Union of Canada versus the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, and its Local 128. Mr. Watson was the former Business Manager of Boilermakers Local 128. With the support of Mr. Watson and some other Local 128 members, the BACU formed the Canadian Brotherhood of Boilermakers as a division within the BACU. BACU began conducting an organizing campaign with a goal of displacing the bargaining rights held by the Boilermakers in respect of various employers throughout Ontario.

The Boilermakers responded by advising their members that if they joined this rival organization, they would not be given any work through the Boilermakers' hiring hall.

The Board held firstly that Section 51(2) did not apply. With respect to whether the Boilermakers' conduct violated Section 76 of the *Act*, Vice-Chair Freedman stated:

> "24. The Boilermakers in their communications were making it abundantly clear what can and would happen to their members who decided to join the BACU, an organization that was seeking to displace the Boilermakers as their collective bargaining agent. In my view, a trade union in the construction industry, particularly one that is responsible for securing employment for its members through the operation of its hiring hall and enforcing its collective agreements is entitled to impose sanctions on its members, including expulsion from membership in accordance with its constitution and by-laws, of those who choose to join or support another trade union that has made clear that its goals include displacing that union's bargaining rights and its ability to continue to secure employment for its members. It seems to me that if a trade union has the right under its constitution and by-laws to expel members because they have joined or support a rival union, that trade union must also have the right to inform its members about what consequences flow from being expelled. That is, those former members will no longer have access to the hiring hall, will no longer be referred to employment, can no longer participate in the union's benefit and training programs and subject to section 51(2) of the Act, may no longer be eligible to continue employment with an employer that is bound by a collective agreement that requires union membership as a condition of employment."

And further:

> "28. When the Boilermakers were making it clear to the applicants and others what would result if they did join the BACU, they were advising them not only that they would be expelled from membership in the Boilermakers but were also informing them in no uncertain terms the consequences that would result from their expulsion from membership. In my view, since it is not contrary to the Act to expel a union member because she or he joined or supported a rival trade union, then making it clear that union members who have been expelled because they joined or supported a rival union

> will no longer be eligible for referral to employment through the hiring hall or participate in that union's benefit and training programs and that their employment may be in jeopardy cannot be a violation of the Act."

The Board, therefore, dismissed the complaint.

The effect of these two Board decisions is that a construction trade union has the right to expel members who join a rival trade union and to cease providing such persons with the benefits of membership – including referral to jobs. This right may be subject to compliance with internal union rules, including notice and due process.

> *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers*, 2014 CanLII 18144 (ON LRB)
>
> *Labourers International Union of North America and Labourers International Union of North America, Local 1059*, 2013 CanLII 28943 (ON LRB)
>
> *Labourers International Union of North America, Labourers' International Union of North America, Local 1059*, 2012 CanLII 4286 (ON LRB)

B. HUMAN RIGHTS AND ARBITRATION: THE EXPANDED ROLE OF THE ARBITRATOR IN HUMAN RIGHTS CLAIMS

Robert M. Church

With human rights now holding a more prominent role in Canadian society (and in our laws) than ever before, unions and their members are being frequently faced with human rights questions in the grievance and arbitration procedure. Concerns about violations of the *Human Rights Code* (the "*Code*") (or related legislation) are often difficult or impossible to separate from other issues in the workplace, and in the last few decades (especially since the Supreme Court of Canada's 2003 decision in *Parry Sound (District) School Services Administration Board v. O.P.S.E.U., Local 324,* 2003 SCC 42 ("*Parry Sound*"), arbitrators are frequently tasked – and some would say have a responsibility – to address human rights issues and interpret and apply human rights legislation and case law in the arbitration hearing.

The question for unions has now become *how* rather than *whether* to address human rights issue if they relate to a grievance and subsequent arbitration – and to recognize the possibility that failing to raise these issues in the arbitration process risks shutting

the door on a member's ability to bring a subsequent claim to a human rights tribunal (the HRTO, CHRT, etc.).

In both the Ontario and federal jurisdictions, labour laws give arbitrators the explicit jurisdiction to consider and apply human rights legislation. For example, under section 48 (12)(j) of the Ontario *Labour Relations Act, 1995*,

"An arbitrator or the chair of an arbitration board, as the case may be, has power...to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement."

The Supreme Court of Canada has also explicitly confirmed that labour arbitrators have the jurisdiction to apply human rights legislation in their decisions. In the 2003 case of *Parry Sound*, a probationary employee was terminated after returning from maternity leave. She alleged her discharge was based on discrimination and contrary to the *Code*. The collective agreement in that case did not allow access to the grievance and arbitration procedure for a probationary employee in a discharge. However, the arbitration board found that the grievance was arbitrable, and the *Supreme Court of Canada* agreed, stating:

"I conclude that a grievance arbitrator has the power and responsibility to enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement."[1] (emphasis added)

In the judgement, the Supreme Court repeatedly emphasized that not only did arbitration normally provide a faster and more accessible way for an employee to litigate disputes, but that a labour arbitrator had the *responsibility* to enforce human rights legislation.

This has led many arbitrators to take jurisdiction over human rights issues as a matter of course, and unions should be prepared to address any human rights complaints a member has made that relate to the arbitration at the hearing, and to explain to members that by proceeding with the grievance, they may be precluded from filing or continuing a claim at a tribunal, like the Human Rights Tribunal of Ontario (the "Tribunal").

How does the Tribunal factor in?

The *Code* in Ontario also gives the Tribunal the power under section 45.1 to dismiss human rights claims if the Tribunal is "of the opinion that another proceeding has appropriately dealt with the substance of the application."

If an employee files both a grievance *and* a human rights application, the Tribunal will generally defer the application until the grievance procedure is finished and a decision is

[1] *Parry Sound*, at para. 1.

rendered. If human rights issues were raised in the arbitration and are addressed in the arbitration decision, the Tribunal will generally defer to the arbitrator's findings and dismiss the application.

However, in situations in which human rights allegations *could have been raised* but were not, and the arbitrator did not address human rights concerns in the decision, employers have successfully argued in the past that the Tribunal should also dismiss the application as an abuse of process, in essence saying that the employee and the union had the opportunity to bring forward a human rights argument in arbitration and did not, and they missed their opportunity.

For example, in the 2009 case *Asiamah v. Olymel S.E.C. / L.P.,* the Tribunal dismissed an application for this very reason, stating:

"Apparently, at some stage of the proceeding, a decision was made not to pursue the allegations of racial discrimination and harassment before the arbitrator. While the applicant asserted before me the fact that this decision was made, no reason or rationale was provided as to why these allegations were not pursued, despite my specific question as to why not. I am well aware that, in a labour arbitration proceeding, the union and not the grievor has carriage of the grievance before the arbitrator, and that in some cases, a deliberate decision may be made by a union not to pursue certain allegations before an arbitrator against the expressed wishes of the grievor. But no such evidence is before me in this case. Rather, in response to my specific questions, it was merely asserted that the allegations of racial discrimination and harassment were not pursued before the arbitrator, without any explanation as to why not and without any indication that this was a decision made by the union....

In my view, in the specific circumstances of this case, it would violate the principles of judicial economy and the integrity of the administration of justice to allow the applicant to proceed before this Tribunal with allegations of racial discrimination and harassment that were within the scope of the grievance that he filed and that was referred to arbitration, where there has been no cogent explanation provided for the failure to pursue these allegations before the arbitrator, and where the evidence actually heard by the arbitrator included incidents which the applicant alleges encompassed blatantly racist comments."[2]

Therefore, if proceeding with an arbitration case in which human rights claims play a role, unions should be ready to consider addressing human rights issues in an arbitration proceeding or, alternatively, be prepared to explain to a grievor the consequences of not bringing forward human rights evidence and arguments in the arbitration hearing – that their allegations may never be heard.

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[2] *Asiamah v. Olymel S.E.C. / L.P.*, 2009 HRTO 1750, at paras. 29 and 38.

C. OCCUPATIONAL HEALTH AND SAFETY UPDATE

Micheil Russell

Commencing July 1, 2014, it is mandatory for all employers in Ontario to ensure that all of their employees and supervisors complete a basic Occupational Health and Safety Awareness Training Program.

In 2013, the government passed a regulation under the *Occupational Health and Safety Act*, the Occupational Health and Safety Awareness and Training Regulation. This Regulation both requires that employees and supervisors complete a basic Occupational Health and Safety Awareness Training Program, and provides specific requirements with respect to the content of the Training Program.

The Regulation requires that employers must:

1. Ensure that employees complete the Training Program as soon as reasonably possible;

2. Ensure that supervisors complete the Training Program within one week of working as a supervisor;

3. Keep a record of the training completed by both employees and supervisors; and,

4. If requested, provide both employees and supervisors written confirmation of the completion of the training.

As stated above, the training regulation specifically requires that the Training Program include certain content. The required content includes the following:

1. The rights and duties of workers under the *Occupational Health and Safety Act*;

2. The duties of employers and supervisors under the *Occupational Health and Safety Act*;

3. Common workplace hazards and occupational illnesses;

4. The role of joint health and safety committees, and health and safety representatives;

5. The roles of the Ministry of Labour and the Workplace Safety and Insurance Board; and,

6. The requirements of the Workplace Hazardous Materials Information System (WHMIS).

An employer is permitted to utilize the resources of its choosing to meet the requirements of the Regulation. However, it is significant that the Ministry of Labour has created workbooks and accompanying teaching guides that cover the content that is required to complete the training programs. Significantly, they have made these materials available online, and they have prepared them in several different languages.

The material can be accessed online by going to the Ministry of Labour website and the training documentation can be accessed through the Health and Safety section of the website.

D. WSIB – TRAUMATIC MENTAL STRESS UPDATE

Simone Ostrowski

Employees with mental injuries stemming from the workplace were significantly empowered by a recent decision by the Workplace Safety & Insurance Appeals Tribunal ("WSIAT"). In WSIAT Decision 2157/09, the WSIAT deemed unconstitutional certain provisions of the *Workplace Safety and Insurance Act* which limit workers' ability to claim benefits for mental stress at the Workplace Safety & Insurance Board ("WSIB") in Ontario.

The *Workplace Safety and Insurance Act* ("the *WSIA*") sets out a seemingly broad entitlement for workers who are injured in the course of their job:

> 13. (1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

However, the following two subsections sharply limit the application of section 13 (1) in the cases of workers with mental injuries:

> (4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.
>
> (5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions

> or actions relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

Essentially, a worker could not claim benefits for mental stress arising from the workplace unless such stress was an acute reaction to a sudden and unexpected traumatic event. Three aspects of this provision are key – the mental stress must be acute (that is, sudden and severe, as opposed to chronic). In addition, the mental stress had to be caused by a traumatic and unexpected event, rather than an expected, or routine, workplace event. Clearly, these Sections were strict as to what types of mental stress would be eligible for benefits under the *WSIA.*

WSIAT Decision 2157/09, issued on April 29, 2014, attempted to change this. In that case, the worker was a nurse who had applied for benefits for her adjustment disorder with mixed features of anxiety and depression. The worker's condition had arisen over years of bullying by a doctor for whom she worked. She was denied eligibility, and she appealed that decision. In an interim ruling on the worker's claim, the WSIAT held that the worker would have had entitlement for her mental stress but for the above noted restrictions on eligibility for mental injuries in Sections 13(4) and 13(5) of the *WSIA*. The worker then argued that those two sections were unconstitutional because they were in breach of Section 15 of the *Canadian Charter of Rights and Freedoms.*

Section 15 of the *Charter* guarantees, *inter alia*, protection from discrimination on the basis of disability. Sections 13(4) and 13(5) of the *WSIA* violated Section 15, argued the worker, because they prejudiced workers with mental injuries from obtaining benefits compared with workers with physical injuries. Workers with physical injuries were not required to prove that their injuries had arisen out a work event that was "traumatic" and "unexpected", nor did they have to show that their injury was "acute" to obtain benefits. Rather, the WSIA grants eligibility for physical injuries that are "disablements", conditions that emerge gradually over time. In making it more difficult to obtain benefits for mental injuries, the WSIAT held that Sections 13(4) and 13(5) discriminate against workers with mental injuries, a group that had been historically disadvantaged due to the negative stereotyping and societal stigma surrounding mental illness. This discrimination could not be justified under section 1 of the *Charter*, held the WSIAT, because the purported benefits of Section 13(4) and 13(5) – namely limiting the amount of payouts for mental injuries – were not proportional to the significance of the *Charter* violation caused by those Sections. The WSIAT, therefore, ruled that Sections 13(4) and 13(5) were unconstitutional and declined to apply them to deny the nurse's claim.

The effects of WSIAT Decision 2157/09, if it stands, are enormous. Sections 13(4) and 13(5) of the WSIA had been used for years to deny entitlement in a significant number of claims. If, going forward, these sections of the *WSIA* are not applied, many more mental stress claims for benefits will be allowed. This decision also helps to bring

Ontario in line with provinces which have schemes that ensure entitlement is limited to work-related injuries in a manner that is less restrictive and is more respectful of the equality rights of persons with mental disabilities. (See Ken Stuebing's article in the Spring 2014 CaleyWray newsletter, "Keep Calm and Carry On – Mental Stress and Workers' Compensation" for a discussion of Alberta's approach).

However, WSIAT Decision 2157/09 is not necessarily the final word on mental stress entitlement in Ontario. The WSIAT's decision may be judicially reviewed, and overturned, by Ontario's Divisional Court. Plus, WSIAT decisions are not binding on the WSIB, the body that actually administers the benefits to workers. It will likely become clear over the next few years whether or not WSIAT Decision No. 2157/09 will lead to ground breaking change in workplace compensation law that it sought to effect. If the decision stands and is applied in future claims, it has the potential to dramatically change the treatment of mental illness in Ontario.

E. NEW FAMILY LEAVE PROVISIONS ADDED TO THE *EMPLOYMENT STANDARDS ACT, 2000*, EFFECTIVE OCTOBER 29, 2014

Micheil Russell and Maeve Clougherty, Student at Law

A new bill introducing additional family leave provisions into the *Employment Standards Act* (*ESA*) becomes law on October 29, 2014. Bill 21, *Employment Standards Amendment Act (Leave to Help Families), 2014*, provides for three new categories of leave: family caregiver leave, critically ill child care leave, and crime-related child death or disappearance leave.

These three new leaves of absence do not replace any of the other family-related leaves under the *ESA.* In fact, employees are entitled to use more than one of these leaves together if the circumstances necessitating the absence fall under more than one category.

Family Caregiver Leave

An employee may take an unpaid leave of absence for up to eight weeks to provide care or support for a family member who has a "serious medical condition". Family member is defined broadly to include immediate family members as well as grandparents, grandchildren and "any relative of the employee who is dependent on the employee for care or assistance", among others. The eight-week limit applies to each individual family member set out in the provision, so an employee who has taken one leave may take a subsequent leave for a different ill family member.

The *Act* does not provide a definition for a "serious medical condition", but it does state that a qualified medical practitioner, such as a physician or a psychologist, must issue a certificate stating that the family member has a serious medical condition.

Critically Ill Child Care Leave

This leave allows employees who have worked for their current employer for at least 6 consecutive months to take an unpaid leave of absence to care for a critically ill child for a maximum of 37 weeks. This leave is also subject to the issuance of a certificate from a qualified medical practitioner, which must not only confirm the fact that the child is "critically ill" and in need of support from a parent but also state the length of time required to care for the child. Thus, the length of the leave is subject to the discretion of the qualified medical practitioner.

"Critically ill child" is defined as "a child whose baseline state of health has significantly changed and whose life is at risk as a result of illness or injury".

This provision covers the following categories of children who are under age 18: biological children, step-children, foster children, and children under an employee's legal guardianship.

To qualify for this leave, employees must notify their employer in writing of their intention to take the leave and further provide their employer with a written plan detailing the weeks of absence. Furthermore, employees must provide a copy of the qualified medical practitioner's certificate at the employer's request.

Crime-Related Child Death or Disappearance Leave

The third category created under Bill 21 provides unpaid leaves of absence for the crime-related disappearance or death of a child for a maximum period of 52 and 104 weeks, respectively. This leave is also subject to the condition that the employee has worked for six consecutive months with the employer. Moreover, this leave may only be taken in one single period.

If the missing child is found alive while the employee parent is taking this leave, the leave will end 14 days from the day the child is found. If the missing child is found dead, the employee parent may take the full 104 weeks of leave from the date of disappearance, whether or not the employee is on leave when the child is found.

"Crime" is defined as a *Criminal Code* offense or otherwise defined by the regulations under the *Canada Labour Code*. "Child" includes step-children, foster children under the age of 18.

As with the critically ill child care leave, the employee must notify their employer in writing of their intent to take this leave and provide a written plan.

Bill 21 in the Unionized Context

While the *ESA* applies to both unionized and non-unionized employees, certain provisions of the *ESA* may be overridden by a collective agreement if it provides a "greater right or benefit" than the statute. This means that if the total package of leave provisions set out in the collective agreement gives employees a better deal than the *ESA*, the *ESA* leave provisions will not apply. Whether or not the collective agreement supersedes the *ESA* pursuant to the "greater right or benefit" rule depends on the specifics of the collective agreement in question.

Conclusion

Unions should be aware of these new leave provisions and consider how they may want to integrate them into their collective agreements in future bargaining rounds.

F. STRONG REMEDIES IN HUMAN RIGHTS CASE UPHELD BY COURT

Douglas Wray

In 2013, the HRTO issued a remedial decision in a case involving *Fair v. Hamilton-Wentworth District School Board*. After finding that the school board had failed to accommodate a disabled employee, the Tribunal ordered reinstatement and awarded over $400,000.00 as compensation, lost wages and damages. The school board's judicial challenge has recently been rejected by the Ontario Divisional Court.

Ms. Fair was employed by the Hamilton-Wentworth District School Board from 1988 until July 2004, when she was terminated. For the last 10 years of her employment, she was Supervisor, Regulated Substances, Asbestos. In the fall of 2001, Ms. Fair developed a generalized anxiety disorder. She was subsequently diagnosed with depression and post-traumatic stress disorder. She had a fear that if she made a mistake about asbestos removal, she could be personally liable for a breach of the *Occupational Health and Safety Act*. She was off on LTD benefits for two years – from March 2002 until April 2004. Her benefits were terminated when it was determined that although she could not perform her own job, she was capable of gainful employment. The school board terminated Ms. Fair when it concluded it could not accommodate her.

After a review of all the facts, the HRTO, in its initial decision in February 2012, concluded that the school board discriminated against the applicant on the basis of disability by failing in its duty to accommodate Ms. Fair since April 2003.

More significant was the HRTO's March 2013 decision on remedy. The Tribunal ordered reinstatement, compensation for all lost wages and benefits and $30,000 as

compensation for injury to dignity, feelings and self respect. The end result was that, in addition to reinstatement, Ms. Fair received over $400,000 in back pay and damages.

The decision received considerable attention: reinstatement was rare for the HRTO to order and the amount of compensation and damages (involving 10 years of lost wages) was extremely high.

The school board sought to challenge the HRTO's remedial decision by way of an application for judicial review. The Divisional Court in a decision released September 29, 2014 dismissed the challenge and upheld the HRTO's decision.

The Court held that reinstatement is an uncommon remedy in human rights legislation but stated:

> "The *Code* provides the Tribunal with broad remedial authority to do what is necessary to ensure compliance with the *Code*. It is fair to say that while reinstatement is unusual, there is no barrier or obstacle to this remedy in law."

It should be noted that the HRTO has only ordered reinstatement as a remedy in very few cases. The Tribunal has also recently stated that it will likely only order reinstatement in some very specific circumstances.

Nonetheless, the Fair case represents an important precedent and provides a strong message to employers of the serious potential liability if they fail to comply with the duty to accommodate set out in the *Human Rights Code*.

> *Hamilton-Wentworth District School Board v. Fair*, 2014 ONSC 2411 (CanLII)
>
> *Fair v. Hamilton-Westworth District School Board*, [2012] O.H.R.T.D. No. 336
>
> *Fair v. Hamilton-Westworth District School Board*, [2013] O.H.R.T.D. No. 420

G. DOCUMENTARY RETENTION: A REMINDER FOR PENSION AND BENEFIT ADMINISTRATORS

Jesse Kugler

Pension administrators are often approached by former members who allege to be entitled to a pension or benefit based on claims of service and contributions made decades earlier with little to no documentary evidence to support their claim. In this environment, it is increasingly important that administrators establish prudent documentary retention policies to ensure that strong defenses can be mounted against unsubstantiated claims.

In *Hunte v. Ontario (Superintendent of Financial Services)*, the Ontario Financial Services Tribunal (FST) (2013) addressed this very concern. In this case, there was a factual dispute relating to applicant's length of service in the pension plan and whether he received a Cash Refund Benefit upon his termination. The claim related to a period of time between 1970 to 1982. The applicant claimed to be entitled to a deferred pension benefit under the applicable pension plan but had no documentary evidence to support such a claim and could not adduce corroborative evidence from any of the seven witnesses that testified on his behalf. The Superintendent of Financial Services (the "Superintendent") and the pension plan administrator both denied the applicant's claims asserting that he did not satisfy the service requirements under the pension plan and that he accepted a Cash Refund Benefits upon his termination in 1982.

In denying the applicant's claim, the FST held as follows with respect to the burden of proof:

> The fundamental burden of proof that an applicant has an entitlement from a pension plan is on the applicant. That burden does not shift. It is possible, of course, that if evidence of the party bearing the ultimate burden of proof raises a *prima facie* case that must be answered, what is usually called "the evidentiary burden" may shift to another party in the course of a hearing. But in our view, the applicant has failed to adduce evidence sufficiently persuasive to shift the evidentiary burden, particularly on the key issue of whether he took a Cash Refund Benefit in 1982 when he left the Plan.

It is clear, then, that the person who asserts an entitlement to a pension benefit bears the burden of proof to establish such an entitlement. However, administrators also have a statutory duty to administer pension plans in accordance with reasonable standards of diligence and prudence, as well as fiduciary obligations to plan beneficiaries. These obligations include a duty to maintain records relating to the pension plan. In *Hunte*,

the applicant claimed that the administrator failed to live up to this obligation. The FST considered this argument, as well as the record-keeping system of the administrator, and commented as follows:

> We are not persuaded that there were defects in the company's record-keeping system of sufficient gravity to raise fiduciary concerns...Certainly the Applicant led no evidence to establish that the company's record keeping policies fell short of the industry standards of the day. In retrospect, the company may wish it had adopted a more defensive policy. We are not, however, prepared to draw any adverse inferences against if for failure to do so.

The FST's decision in *Hunte* provides an important reminder that individuals who claim an entitlement to a pension benefit bear the burden of proving such a claim. However, the decision provides an equally important reminder that administrators must ensure they have or implement a prudent records management and retention policy. In this regard, the Financial Services Commission of Ontario (FSCO) has released Policy A300-200, "Management and Retention of Pension Plan Records by the Administrator", which provides guidance on establishing or implementing such policies.

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