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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CaleyWray

Labour/Employment Lawyers
Suite 1600
65 Queen Street West
Toronto ON M5H 2M5

T: 416-366-3763
F: 416-366-3293

www.caleywray.com

A. PUTTING STUDENTS FIRST ACT IS DECLARED UNCONSTITUTIONAL

Micheil Russell

The Provincial Government introduced the *Putting Students First Act* (*PSFA*) in the summer of 2012. Prior to the introduction of this Act, the government had signed a Memorandum of Understanding with the Ontario English Catholic Teachers Association ("OECTA") which established the terms and conditions for their Collective Agreement.

The *PSFA* was introduced on August 31, 2012 as the statutory freeze would come into effect upon the expiry of the various teacher collective agreements. The effect of this would have been significant increases in compensation to teachers as a consequence of movement through salary grades.

The *PSFA* required that any collective agreements in the School Boards had to be "substantially identical" with the agreement that was entered into with OECTA. A deadline of December 31, 2012 was made for the finalization of collective agreements and if the deadline was not met then the collective agreements could be imposed.

The Court application was brought by several of the impacted Unions arguing that the *PSFA* was a breach of the right of freedom of association guaranteed by the *Charter of Rights and Freedoms.*

The Court issued a decision on April 20, 2016 in which it determined that the government had substantially interfered with a meaningful process of collective bargaining. The decision determined that the legislation was "fundamentally flawed." The Court concluded that the process was designed to allow the Province to "meet physical restraints it determined and then set a program which limited the ability of the other parties to take part in a meaningful way."

The judge who made the decision was quite scathing about the *PSFA* and stated that, when it is understood "in the context of the process as a whole, it becomes apparent that it did nothing other than sustain and confirm the interference with collective-bargaining."

The judge continued and stated that the requirement that the collective agreement be "substantially similar" to the OECTA Collective Agreement "made it clear that there would be no bargaining that diverted in any meaningful way from the terms of the OECTA deal."

At the request of the government and the unions involved, the Court did not provide a specific remedy but the judgment states that the remedy would be left to the parties to consider after the decision issued.

The decision is significant in that it clearly indicates that Government legislation that eliminates a process of meaningful collective-bargaining is contrary to the freedom of association guaranteed by the *Charter of Rights and Freedoms*.

B. INTRODUCTION OF THE ONTARIO RETIREMENT PENSION PLAN (ORPP)

Mike Blanchard

Ontario has recently introduced the *Ontario Retirement Pension Plan Act (Strengthening Retirement for Ontarians) 2016*. The aim of the *Act* is to provide a retirement savings plan in addition to Old Age Security and the Canada Pension Plan to provide retirement security for Ontario workers who are facing inadequate retirement savings.

The ORPP will have the following attributes:

Participation and Eligibility

Workers between 18 - 70 years old: By 2020, every eligible worker aged 18 to 70 in Ontario would be part of the ORPP or a comparable workplace plan. A member would be required to stop contributing when they reach 70 years of age.

Self-employed and non-crown federally-regulated workers: Individuals who work in industries such as banks, telecommunications, railway and air transportation would not be eligible to participate at this time, due to the current structure of federal income tax and pension rules. The province is currently in discussions with the federal government to support the participation of federally-regulated employees and the self-employed in the ORPP.

First Nations: On-reserve First Nations employers and their employees would have the option to opt-in to the ORPP.

Religious Exemptions: Individuals who object to participation in the ORPP on religious grounds may apply to the ORPP AC for an exemption. Future regulations will lay out the criteria for a religious exemption which would follow a similar approach to CPP.

Definition of Ontario Employee

A person would be considered employed in Ontario if they report to work, full- or part-time, at an employer's establishment in Ontario. This also applies to a worker whose salary or hourly wages are paid from an Ontario-based employer, but who is not required to work at an employer's place of business (e.g., work from a home office).

Employer Duties

Employers would be required to pay contributions on behalf of each of the eligible workers employed in Ontario, and also to collect and remit contributions from those workers.

Employer and Employee Contributions

Employees and employers would each contribute 1.9 per cent of the employee's annual earnings up to $90,000 (2017 dollars).

The full contribution rate would be phased in over time based on the size of the business.

Comparable Plans

The ORPP would be mandatory for employees and employers without a comparable workplace pension plan. Comparable workplace pension plans are registered pension plans that meet a minimum benefit/contribution threshold:

- Defined benefit (DB) plans - where an employee's earnings history is considered as part of their retirement income calculation, the annual benefit accrual rate must be at least 0.5 per cent

- Defined contribution (DC) plans - must have a minimum total contribution rate of 8 per cent, with employers contributing at least half that amount (voluntary contributions would not be applicable for the purposes of the ORPP comparability test)

- Multi-employer pension plans (MEPP) - individual employers would have the option to assess the pension benefit comparability of their plan by using either the DB accrual or DC contribution rate threshold

- Pooled-registered pension plans (PRPP) - when available in Ontario, a benefit/contribution threshold will be set for PRPPs.

C. THE ONTARIO GOVERNMENT'S MANDATORY 10-YEAR LIMIT ON PUBLIC APPOINTMENTS IS A MOST PRESSING CONCERN

Ken Stuebing

As you may be aware, the Ontario government has imposed a 10 year limit on appointments under the current Government Appointees Directive. According to the Directive, provincial administrative tribunals including the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") and the Ontario Labour Relations Board ("OLRB") will be unable to re-appoint full-time and part-time Vice-Chairs and Members, who have gained 10 years of experience in their given position. It is 2016 and the 10 year term limit has come into effect - without serious policy justification or rationale.

The 10-year term limit is a direct blow to the unique experience and expertise required of Vice-Chairs and Members at the OLRB and WSIAT. Both are quasi-judicial bodies that together adjudicate thousands of decisions each year in a field of law that is quite complex and demanding. The parties that appear before these decision makers rely on a high standard of adjudication that appreciates the intricacies of labour related law and of worker's compensation law. By the time an appointee has attained 10 years of experience, that individual is capable of producing a high volume of decisions on the most complex issues.

The impact of the 10-year term limit on Vice Chairs and Members at the OLRB - particularly in specialized adjudication of disputes in the construction industry - raises serious concerns. Further, the expected impact of the 10-year term limit on highly specialized, expert Vice Chairs at the WSIAT is alarming.

The application of the 10-year limit could have a profound negative impact on the ability of the OLRB and WSIAT to continue to deliver timely, high quality justice.

An April 6, 2016 article in the Toronto Star entitled, "Fair appeals for injured workers under threat, experts warn," reported that the impact of the 10-year term limit in an already delay-ridden a workers' compensation system is reaching a "critical moment". According to a report by the Society of Ontario Adjudicators and Regulators, the cap will hit WSIAT harder than any of the 17 other provincial tribunals examined, resulting in a "sudden, significant loss" of experienced staff. In the coming year, the average experience of WSIAT adjudicators will drop from 10 years to three.

The anticipated impact of the 10-year term limit represents a most urgent issue affecting the administration of justice in the workers' compensation system in Ontario.

In spite of concerns being raised by multiple stakeholders in various consultations over the last year, the Ministry of Labour has signalled no indication that it will withdraw or

amend its 10 Year Term Limit. Moreover, the Ministry and Public Appointments Secretariat have failed to provide any cogent, formal justification in support of the 10 Year Term Limit.

Limiting terms for Vice-Chairs and Members to 10 years will have a significant negative impact on both the quality of the decisions made by WSIAT and the backlog of cases at these Tribunals. In particular, now is assuredly not the time to be thinning the WSIAT's ranks. Last April, the WSIAT reported that its active appeals inventory was in excess 9,000 active appeals. It is taking more than two years to process appeals. This backlog has arisen for a number of reasons, including the WSIB's appeals modernization process. Regardless of its causes, the impact of the backlog has been stark on workers (and employers) seeking to have pressing matters finally adjudicated.

The transfer of complex appeals from experienced Vice-Chairs to newer adjudicators will only cause further delays in the decision-making process. This could also lead to an increase in the number of judicial review applications, as those complex appeal decisions would be written by less experienced Vice-Chairs.

The result of the 10-year cap is perilous to a functioning WSIAT. A significant number of the WSIAT's Vice-Chairs will be ineligible for appointment in 2016 and 2017, which will result in a loss of institutional memory as well as a need to train new adjudicators.

The 10-year term limit will discourage highly qualified candidates from ever seeking or accepting these critical positions, because they will know the term limit prevents them from continuing to serve after 10 years, regardless of their contribution and value to the system.

In addition to these immediate practical impacts of the ten year term limit, there is the further implication that insecurity of tenure inherent in the Ontario government's mandatory 10-year public appointment limits may undermine WSIAT Vice Chair and Members' institutional independence and impartiality.

There is an urgent need for action and intervention on this most pressing matter. Please help raise awareness of this matter and encourage your members to contact local MPPs; if anyone has any broader, coordinated response to suggest I am all ears.

D. EXCESSIVE PERSONAL INTERNET USE AT WORK AND TIME THEFT

Meg Atkinson

It has long been established in unionized workplaces that one of the most serious offences that an employee can commit is theft. Employees who commit theft at work are disciplined harshly and often terminated, and arbitrators seldom allow grievances challenging the just cause for discipline where the employer establishes that the employee committed theft. This includes theft of the employer's product, of the employer's supplies, from clients or other third parties, and "time theft".

Time theft occurs when an employee engages in conduct which does not form part of any work-related duty while the employee is paid for the time. Historically, typical time theft involved the employee having a colleague punch them into work while the employee in fact arrived at work late, or having an colleague punch them out of work when the employee in fact left early. Another typical example for employees who drive as part of their job, is taking personal time during the day to either go home, run errands, or go somewhere for a non-work-related purpose.

In these cases, even where the employee has a clean disciplinary record and twenty or more years of seniority, Unions are often not able to succeed in setting aside the discipline.

More recently, employees have been held accountable for spending excessive time on the Internet or on personal cell phones while at work. Although this may not be typical "time theft" as there is not as clear of an intent to "steal" time, the conduct nonetheless attracts harsh punishments up to and including discharge.

In the 2012 case of *Unite Here Local 75 and Fairmont Royal York Hotel (Gonzales)*, 216 LAC (4th) 159 (Trachuk), the grievor had accessed the Internet during working hours for non-work-related purposes for extended periods of time every working day during a thirty (30) day audit conducted in the workplace. The Employer characterized this as "time theft" and terminated the grievor.

At paragraph 12 of the decision, Arbitrator Trachuk stated:

> Spending extended periods of time on a computer accessing the Internet when one is supposed to be working is very serious misconduct. The fundamental agreement between an employer and an employee is that the employee will perform work and the employer will pay her or him. Taking money from the employer without performing the work is a violation of that basic understanding.

Although the conduct is not "time theft" in the traditional sense, it raises similar concerns. Arbitrator Trachuk also concluded that, in addition to taking value from the employer, the conduct was also a betrayal of trust: it is critical that an employer be able to trust its employees to work productively without requiring constant supervision. Betrayal of that trust warrants harsh disciplinary consequences.

Fortunately for the grievor, notwithstanding Arbitrator Trachuk's conclusion about the appropriateness of discipline for his actions, she also identified important mitigating factors, including: the grievor's "trust equity"/rehabilitative potential (created by the combination of 18 years of service and the grievor's clean disciplinary record), the lack of any evidence that the Internet use caused particular prejudice to the employer (i.e. no lapse in his duties), and the lack of any evidence that the content of his Internet use was inappropriate or illegal. The grievor was reinstated, but without any compensation for the 15-months between his termination and the date of the decision.

As the Internet is increasingly the foundation for the majority of our information, communication, coordination and entertainment purposes, it is becoming more and more likely that employees will wish to access the Internet during working hours. Indeed, such use is becoming easier to trace by employers through technology audits or specialized software which allows employers to view which websites employees visited and for how long. On the other hand, many employers accept that employees are entitled to reasonable amounts of personal Internet usage during a working day, and many have policies to clarify expectations in this regard.

Employees and trade unions must be acutely aware of the thin line between what is "reasonable" access to the Internet for personal reasons, and what is excessive Internet or computer use which essentially amounts to conduct comparable to time theft. In the latter cases of excessive use, it may be very difficult for trade unions to reverse a disciplinary consequence to an employee who was excessively surfing the Internet for personal reasons.

E. DISCLOSURE OF DISABILITY AFTER TERMINATION MAY NOT NEGATE JUST CAUSE FOR DISMISSAL

Jesse Kugler

In a recent decision of the Ontario Court of Appeal, *Bellehumeur v. Windsor Faculty Supply Ltd.*, the Court upheld an employer's decision to terminate the employment of Mr. Bellehumeur notwithstanding the fact that he disclosed that he suffered from a mental health disability after his termination which he asserted caused or contributed to his misconduct and which therefore required the employer to accommodate his disability.

The Court of Appeal held that since the employer was unaware of Mr. Bellehumeur's disability at the time of his termination, it did not engage in discriminatory conduct under the *Ontario Human Rights Code* when fired him for uttering threats at work:

> The trial judge concluded the threats made on November 1, 2005 were workplace violence. The respondent being unaware of the appellant's mental disability did not engage in discriminatory conduct under the Ontario Human Rights Code when it fired the appellant. They fired him as they would any employee who engaged in such workplace misconduct.

In rendering its decision, the Court cited the British Columbia Court of Appeal's decision in *British Columbia (Public Service Agency) v. British Columbia Government and Services Employees' Union*, where it dealt with the issue as follows:

> I can find no suggestion in the evidence that Mr. Goodings termination was arbitrary and based on preconceived ideas concerning his alcohol dependency. It was based on his conduct that rose to the level of crime. That his conduct might have been influenced by his alcohol dependency is irrelevant if that admitted dependency played no part in the employer's decision to terminate his employment and he suffered no impact for his misconduct greater than that another employee who suffered for the same misconduct.

Accordingly, the Court of Appeal concluded that since Mr. Bellehumeur's mental disability was unknown to the employer, it cannot be said that it played a role in its decision to terminate his employment. On February 25, 2016, the Supreme Court of Canada denied leave to appeal from the Court of Appeal decision.

This decision has the potential to have a profound impact on the rights of employees who suffer from disabilities not disclosed to employer that may cause or contribute to performance issues or misconduct. In light of this decision, it would be prudent for employees to disclose disabilities at an early stage, and in any event prior to the imposition of discipline, in an effort to trigger a duty to accommodate under the *Ontario Human Rights Code*. What is not clear is how the Court of Appeal's decision in *Bellehumeur*, which was endorsed by the Supreme Court of Canada, can be reconciled with the Supreme Court of Canada's decision in *Cie Miniere Quebec Cartier v. Quebec (Grievances Arbitrator)*, a decision that is often relied upon in the context of grievance arbitration which confirmed an arbitrator's jurisdiction to consider post-discharge evidence "if it helps to shed light on the reasonableness and appropriateness of the dismissal ...at the time it was implemented".

F. CONSTRUCTION MANAGER JAILED FOR HEALTH AND SAFETY VIOLATIONS

Mike Blanchard

For the first time in Canadian history, a construction manager was sentenced to 3½ years in prison for health and safety violations causing the deaths of four workers. In the fall of 2009, Kazenelson was a project manager for Metron Construction, who was engaged to refinish concrete balconies on a high-rise building. The swing stage the workers were using broke, sending four of the six workers on the stage to their death. One of the workers was harnessed to the lifeline, saving his life, while another survived the fall but with permanent injuries.

The manager was found guilty of four charges of criminal negligence causing death, and one count of criminal negligence causing bodily harm. He was found guilty on all counts. Investigators found that the swing stage was equipped with only two lifelines despite six workers using the swing stage each day.

The Court found that Kazenelson knew there were insufficient lifelines for the number of people working, and that he had no information as to the load-bearing capacity of the swing stage. By allowing workers to use the swing stage in these circumstances, his conduct was found to be criminally negligent.

In passing his sentence, Justice Ian MacDonnell noted that even though Kazenelson did not direct the six men to work on the high-rise with only two lifelines, he was responsible to rectify the situation when he became aware of the risk.

The conviction was the first time that a manager will face jail time for a violation of the *Criminal Code* since the passage of amendments in Bill C-45 arising from the Westray Mine disaster that killed 26 workers in Plymouth, Nova Scotia in May, 1992. Since the amendments were passed, eight charges have been brought under the provisions. Kazenelson's sentence is the first time that a jail sentence has been attempted under the provisions.

In addition to the above sentence, in separate proceedings, Metron Construction, Kazenelson's employer, were ordered to pay $750,000 after pleading guilty to criminal negligence causing death in 2012. Also, Metron's owner, Joel Swartz, was ordered to pay $112,500 after pleading guilty to four violations of the *Occupational Health and Safety Act*. The manufacturer of the swing stage which failed, Ottawa-based Swing N Scaff Inc., was fined $350,000, and one of the company's directors was fined $50,000 for their contribution to the accident.

As this case illustrates, health and safety violations which result in serious injury can result in more than just fines; there is a possibility of jail time for such violations.

G. HUMAN RIGHTS UPDATE

Micheil Russell

The following will present a summary of two recent significant decisions of the Ontario Human Rights Tribunal. The first involves the issue of the amount of general damages that the Tribunal may award. The second involves whether or not a miscarriage is a disability.

General Damages

In a recent award, the Ontario Human Rights Tribunal has awarded record general damages to two employees for Human rights violations.

Under the *Ontario Human Rights Code*, there is a power to award general damages for injury to dignity, feelings and self-respect. Prior to the recent award, the largest awards granted were in the $30,000-$40,000 range.

In the decision *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675, the Tribunal awarded general damages to each of the two complainants in the amount of $50,000 and $150,000 respectively. The Tribunal found as a fact that the two employees who were working in Canada under the Temporary Foreign Worker Program were the victims of extremely serious discrimination on the basis of sex which included harassment, touching, and sexual assault.

The Tribunal focused extensively on the vulnerability of the two Complainants, who were female migrant workers employed in Canada under the Temporary Foreign Worker Program, and were especially vulnerable to threats from their employer that they could be sent back to their country of origin if they did not comply to his sexual solicitations.

The significance of this case is that it clearly demonstrates that in appropriate circumstances the Tribunal is prepared to award very substantial general damages in order to properly compensated employees whose human rights have been violated.

Definition of Disability

In a recent decision, the Ontario Human Rights Tribunal was required to consider whether or not a miscarriage, and the resulting significant emotional distress that it caused was a disability for the purposes of the *Ontario Human Rights Code*.

In the case of *Wenying (Winnie) Mou and MHPM Project Leaders*, 2016 HRTO 327, the employer made a request that the Tribunal dismiss an application without a hearing on the basis that the applicant did not have a disability as defined by the *Ontario Human Rights Code*. The request made by the employer was denied.

The Tribunal specifically said that in its opinion a miscarriage is a disability. In fact, the Tribunal went further and stated that miscarriage may be covered also under the ground of discrimination in the basis of sex, as well as at an intersection of sex and disability.

The Tribunal rejected submissions made by the employer that for a medical condition to be a disability it must have permanence and persistence. Rather, the Tribunal determined that a disability could be temporary, and its effects can also be over by the date on which the discriminatory treatment occurs.

In this case, the employee was terminated on the basis of attendance issues. The attendance issues were related to the miscarriage and significant emotional effects, and while they were no longer present at the time of termination, they had impacted the attendance at work of the employee.

The decision is important as it shows that the Tribunal will apply the *Ontario Human Rights Code* in a way that provides for an expansive definition of disability which is to the benefit of employees.

Note: *The information contained in this Newsletter is not intended to constitute legal advice. If you have any questions concerning any particular fact situation, we invite you to contact one of our lawyers.*

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Labour/Employment Lawyers

Suite 1600
65 Queen Street West
Toronto ON M5H 2M5

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F: 416-366-3293

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