LABOUR & EMPLOYMENT LAW NEWSLETTER

Quarterly Update for CEOs, HR Managers, Corporate Executives and In-House Counsel on the Latest Developments in HR and Employment Law

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ABOUT US

Soloway Wright LLP's Employment Law Group provides legal advice to employers on all issues of human rights, labour and employment law.

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DID YOU KNOW THAT CURRENTLY…?

- An employment agreement is generally invalid if first read and signed by the employee on the very same day that she first begins her job;
- An employer's sincere, but mistaken, belief that an employee was a "*self-employed consultant*" or "*independent contractor*" is no defence to a claim by the Canada Revenue Agency for past years of unremitted Income Tax, EI and CPP, that the employer failed to deduct from the consultant's salary;
- It is illegal for you to deduct any of the money which an employee may owe your organization from the wages, statutory severance pay and statutory termination pay which you owe her, absent her signed written authorization to do so, or a court order;
- When you refuse to provide a reference letter to a terminated employee you now run the risk that a court may punish you by ordering you to pay additional damages;
- As an employer, you cannot be successfully sued for anything you write in a reference letter or say about an employee on the telephone, if it is written or said in good faith, without recklessness and in the sincere, but perhaps mistaken, belief that what you are saying or writing is accurate;
- If your termination of an employee inadvertently contravenes certain provisions of the Ontario *Human Rights Code,* the *Employment Standards Act*, or the *Occupational Health and Safety Act*, a court or tribunal can set aside that termination and issue an order forcing you to reinstate the dismissed employee and to pay him full back-pay, retroactive to the date of termination, as well as any other damages he may have suffered in the interval, due to the temporary termination of his employment.

JUDICIAL UPDATE:
The Most Important Court Decisions From The First Quarter of 2017

***Johal v Simmons da Silva LLP*, 2016 ONSC 7835**

This decision, which was released by the Ontario Superior Court shortly before January, clarifies when an employee may lawfully rescind his resignation and insist that his employer reinstate him into the job from which he had resigned.

In this case, a law clerk had quit work at the law firm where she had been employed for 27 years, after becoming enraged over a directive from one of the firm's partners ordering her to work closely with a fellow-law clerk with whom she had an acrimonious relationship. Following this directive, the law clerk left the office for the rest of the day. When she returned to the office the following morning she handed in her security pass, collected her belongings and went home.

After not hearing from the absent employee for several days, the employer sent her a letter formally accepting her resignation. When the employee responded to this letter the next day, advising that she wished to *retract* her resignation, the employer told her that it was too late for her to do so since her resignation had already been accepted.

In its decision, the Court ruled that while the employee had quit work for several days without authorization, she had not truly resigned. The Court posited that for an employee's resignation to be legally binding, it must clearly and objectively reflect an *unequivocal* decision to actually resign. The Court stated that the employee was entitled to a few days to cool off and gather her thoughts, and that during that time, the employer could and should have made greater efforts to ascertain whether or not she had really decided to resign.

As a result of the employer not allowing the employee to return to work, the Court found that the employer's actions amounted to constructive dismissal of the employee, and ordered the law firm to pay its employee a very significant sum of pay in lieu of notice, in the range of 16 to 24 months of salary.

Just as notably, the Court also ruled that an employee's unequivocal resignation becomes legally binding on her if the employer communicates to her its acceptance of that resignation *before* she rescinds it. The Court stated that this will be so even in the absence of evidence that the employer has not yet taken any irrevocable steps in reliance on that resignation, like hiring someone into her vacated position. However, if the employer has not accepted the resignation, it can still become legally binding if the employer has evidence that it has irrevocably acted in reliance on the resignation.

***Demers v MatchTransact Inc.,* 2017 HRTO 98**

In January, the Ontario Human Rights Tribunal issued a decision which illustrates the serious sanctions that employers now face if they try to coerce their employees to not exercise their statutorily protected rights under either the *Employment Standards Act* (the "*ESA*") or the Ontario *Human Rights Code* (the "*Code*").

In this particular case, a managerial employee sought to exercise his statutory right under the *ESA* to take *unpaid* parental leave following the birth of his son. His employer strongly discouraged him from taking parental leave and, despite the employee's eventual agreement to not do so, still used his request against him as a basis for denying him a promotion.

When the employee's infant son later fell ill, he nonetheless insisted on taking some emergency parental leave to help with his care. The employer proceeded to falsely tell his work colleagues that he had resigned. When the employee later dropped by his work premise, during his leave, to see his colleagues, the employer threatened to expel him from the shopping centre where the business was located.

In response to the employer's actions, and shortly before he was due to return from his emergency parental leave, the employee filed a human rights complaint, as he was entitled to do under the *Code*. In reprisal, upon his return from leave, the employer arranged for subordinate employees to spy on him, stripped him of some of his managerial duties, and relied on a false accusation of sexual harassment to dismiss him.

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TATTOOS, LIP RINGS AND OTHER OSTENTATIOUS BODY PIERCINGS: When Can You Force Your Staff To Remove Or Conceal Them?

In recent years, fashion trends have caused more and more employees to adorn their bodies with tattoos and various forms of body piercings. Often, these are affixed onto clothed parts of the body and are hence safely concealed from the human eye. But occasionally, such tattoos and piercings appear on exposed arms and legs and even on noses, lips and tongues.

For many young people, sporting such tattoos and piercings at work constitutes a '*hip*' fashion statement, but for employers and clients of an older generation, these can sometimes be distracting, and even repellant. On occasion, such employers or clients may find those tattoos and piercings to be so off-putting that they would prefer to limit contact with those employees, and/or with the organization which employs them.

As an employer, or HR manager, can you ever *force* an employee to cover up, or perhaps even remove, such decorations to his or her body, whenever you subjectively feel that those may be out-of-step with the more conservative corporate image which your organization is trying to project to its clients?

The answer to this question depends largely on whether or not your workforce is unionized. On this particular issue, the law grants far greater freedom to non-unionized employers than to their unionized counterparts.

I. If your workforce is non-unionized, then you can force your staff to cover up all tattoos and/or remove all body rings and studs

In their dealings with their employees, non-unionized provincially regulated employers are constrained solely by the terms of their employment contracts, by the common law, and by the provisions of provincial employment legislation like the Ontario *Human Rights Code* (the "*Code*").

The right to have a tattoo or wear rings on your body is not regulated by any Ontario law. The *Human Rights Code* protects an employee's freedom of religion but not his or her freedom of *artistic expression.* It also prohibits employers from discriminating against employees on the basis of their religious beliefs and their natural and inherent physical characteristics, such as race, skin colour or physical disability, but does not prohibit employers from discriminating against their employees based on changes which those employees *voluntarily* choose to make to their own physical appearance for reasons of fashion. Accordingly, as a general rule, the law permits you to freely discriminate against your employees based on the adornments they wear so long as wearing those adornments is not a necessary component of their religious practices.

Other than in the exceedingly rare situation where the employee's tattoo or body piercing is connected with his or her sincere observance of a religious practice (as could be true in the case of an employee of Maori background), the *Code* leaves non-unionized employers in Ontario completely free to insist that their employees cover up, or even physically remove their piercings and tattoos, as a condition of continued employment.

Since the *Code* does not prohibit Ontario employers from discriminating against their employees on the basis of such tattoos or piercings, non-unionized employers are free to arbitrarily terminate any employee on the express grounds that they subjectively find the employee's tattoo or body piercing to be unattractive. The fact that the employer may be unjustified in its subjective prejudices is irrelevant because in the absence of restrictions in the *Code*, the employer may largely do as he pleases.

Accordingly, before terminating the employee, a non-unionized employer is not required to demonstrate that such tattoos or body piercings might harm its business image, or prove to be unwelcome to its clients. The employer, or its HR Manager, can terminate the employee simply on the basis that management subjectively and arbitrarily dislikes the look of the particular tattoo or body piercing of that particular employee.

Nor is the employer or HR Manager even required to provide the employee with any advance warning or opportunity to cover up or remove the tattoo or body piercing; rather they can proceed to dismiss the tattooed employee without first asking him or her to '*clean up*' his or her appearance.

In such instances, all the employer is required to do is to provide the dismissed employee with the usual contractual or common

law notice of termination or pay in lieu of such notice, as stipulated in the employee's employment agreement.

II. If your workforce is unionized, then you may have to establish that removing or covering up the tattoos or body piercings is necessary for maintaining the company's business image with its customers.

In contrast, unionized employers are much more limited in what steps they can take to prevent their employees from exhibiting tattoos and body piercings in their workplaces.

As a general rule, before introducing new rules regarding tattoos and body piercings, unionized employers must first either obtain the approval of their employees' union or establish that those new rules satisfy the following criteria which were enumerated in the arbitral decision in *Lumber & Sawmill Workers' Union, Local 2537 v KVP Co. (1965):*

- The new rules must be clear and unequivocal;
- These rules must be reasonable in the sense that they must be based on objective evidence and the legitimate business needs of the employer; and
- These rules must be consistent with the existing provisions of the collective agreement and be enforced consistently among *all* employees.

In assessing whether or not a restriction on tattoos or piercings is reasonable, an arbitrator starts from the premise that employees have a personal right to present themselves as they themselves see fit. When an employer seeks to infringe on that right it must establish through the use of objective evidence, such as complaints from customers, that the rule or ban is either necessary to protect a business interest of the company or is useful for the protection of health and safety in the workplace.

What is necessary or useful will vary from workplace to workplace depending on the public visibility of the employees to customers and the public and on what potential clients in the community believe to be appropriate.

Even if the employer is able to enact rules restricting tattoos and piercings, before terminating, or even disciplining, an employee the unionized employer must first have brought those rules to the attention of that employee, have warned her of the consequences of breaching them and have consistently enforced those rules in the past.

The ability of unionized employers to restrict their employees' ability to exhibit tattoos and piercings at work was recently tested in the case of *Ottawa General Hospital and CUPE Local 4000.* In that case, the Ottawa General Hospital sought to enforce a new dress code policy for its employees whereby the latter would be required to cover large tattoos and remove all jewellery, with the exception of small unobtrusive earrings.

The employees, through their union, objected to these requirements on the basis that they were not clear and unequivocal, were not consistently applied and most importantly because the employer could show no legitimate business need to enact such rules.

The employer, on the other hand, argued that these rules were necessary in order for it to fulfil its requirements under the *Excellent Care for All Act,* which requires hospitals to constantly seek to improve the services they deliver. The employer argued that its elderly patients should be cared for by staff who projected a professional image which inspired confidence.

The arbitrator rejected the employer's arguments and struck down its proposed restrictions on tattoos and jewelry because the Hospital could not adduce any specific evidence of negative patient reactions to tattoos and piercings. In addition, the restrictions were also found to be overly vague, thereby potentially leading to uncertainty and inconsistent enforcement.

Accordingly, before establishing rules for what tattoos or piercings can be exhibited, the unionized employer, unlike its non-unionized counterpart, must either receive the approval of the union to do so, or prove to the satisfaction of an arbitrator that the proposed rules are objectively necessary either to maintain workplace health or safety or to protect the employer's business interests with its client base.

A wise employer who wishes to regulate what tattoos and body piercings can be exhibited in its workplace will first consult an experienced employment lawyer so as to ensure that such regulation of tattoos and piercings fully complies with that employer's existing legal obligations.

EMPLOYERS TAKE NOTE:
The Potential Savings To Be Realized By Reassigning Employees During Corporate Reorganizations

Recent economic pressures have forced many companies to restructure their workforces and to reassign staff to new positions within their organization.

If organized properly, such staff reassignments can result in your organization realizing significant payroll savings. However, if the reassigned employee chooses to refuse the reassignment, it may become a constructive dismissal, thereby triggering expensive termination costs for your organization.

There are certain circumstances where an employee has no choice but to accept his or her reassignment to a new position, even if that reassignment involves a demotion to a job with lesser responsibilities. In the last few years, the Courts have redefined the circumstances in which an employee will be required to accept reassignment to a new, but less attractive, position within your organization.

An employee who has been wrongfully dismissed is legally obliged to try to off-set the loss of salary resulting from his or her dismissal by actively seeking alternative employment. He will be denied an award of damages if he or she has unreasonably refused an offer of comparable employment made shortly after his or her dismissal.

In the important case of *Evans v Teamsters Local Union No. 31*, the Supreme Court of Canada ruled that constructively dismissed employees are obligated by law to accept reassignment to lower-ranking jobs in order to mitigate their damages, while they look for alternative employment, if:

- Accepting the new position would not require them to work in an atmosphere of hostility, embarrassment or humiliation;
- The new job is not substantially different from the old one, and the remuneration and benefits are comparable;
- The new job would not require them to do work that is demeaning;
- The relations between employer and employee are not acrimonious; and
- The new job was offered before the start of litigation.

Recently, in April 2017, the Ontario Court of Appeal released its decision in *Fillmore v Hercules SLR Inc.* in which it clarified that an employer who reassigns an employee to a new position, which he rejects, must subsequently reoffer that position to

that reassigned employee a second time so as to provide the employee with the opportunity to work for the duration of the notice period.

In *Fillmore*, the Court of Appeal ruled that even where all the factors listed by the Supreme Court in *Evans* have been met, the failure to offer the reassigned position to the employee a second time, after his initial refusal and after termination of the employment relationship, will mean that the employee is *not* required to accept the reassigned position in order to mitigate damages.

Remembering this can potentially save an employer significant sums of money during a reorganization. Instead of having to provide reassigned, and constructively dismissed, employees with hefty severance packages as is generally required in cases of highly specialized and long-term, or older, employees, employers can now realize significant potential savings by reassigning those long-term or older employees to lower positions so long as the aforementioned factors listed in *Evans* and *Fillmore* have been met. In such circumstances, the constructively dismissed employee must either accept the less attractive offer, or by refusing it, forego his or her legal entitlement to his common law notice, due to his or her failure to mitigate.

To the extent that the salary or benefits of the new, lower position, are inferior to those of the former position, if the employee sues, he or she, in most circumstances, will be limited to recovering the differential between the two salaries. Where this differential amounts to less than $10,000.00, suing the employer will appear to many employees to be very unattractive, owing to the likely costs of protracted litigation. The truth is that in a majority of such cases it will not be economically practical for the employee to pursue what may, in theory, be a highly winnable case against your organization.

JUDICIAL UPDATE – Continued from Page 2

The Ontario Human Rights Tribunal ruled that the employer's actions amounted to an illegal, and very serious, reprisal against the employee for having availed himself of his statutory right under the *ESA* to take parental leave, and to file a complaint against his employer under the *Code*. To punish the employer, the Tribunal awarded the employee $30,000 in human rights damages and 9 months of lost wages (the period of time which it subsequently took the employee to find new employment following his wrongful dismissal).

In the wake of this decision, it behooves employers to take care to avoid the perception that they are unduly pressuring employees to refrain from exercising their statutorily protected rights under the *ESA,* the *OHSA,* or the *Code,* or that they are trying to punish them, after the fact, for having done so.

Doyle v Zochem Inc., **2017 ONCA 130**

In February, the Ontario Court of Appeal released a decision highlighting the severe consequences which employers now face if they either fail to properly investigate complaints of harassment or unfairly terminate their employees in bad faith.

In this case, the plaintiff employee was the victim of ongoing sexual harassment by one of her managers. That manager repeatedly belittled her in front of her co-workers, causing her to fall ill with depression. When she filed a harassment complaint against her manager, her employer performed only a cursory investigation into the complaint. The employer then falsely told her that her job was not at risk when it knew a decision had already been made to terminate her. When the employee later applied for short-term disability, the employer, who self-funded its own benefits, denied the claim despite the employee's clear medical evidence proving her disability.

In reaching its decision the Court also cited the employer's actions which included telling the employee that she was acting irresponsibly in pursuing her harassment complaint against her manager, pressuring her to sign a Release on the spot when terminated and concluding the termination meeting by arranging for another employee to take her car keys from her purse so as to drive her car to the front door of the plant.

The Ontario Court of Appeal confirmed the lower court's decision ordering the employer to pay 10 months' salary and benefits for wrongful dismissal, $25,000 in human rights damages for sexual harassment and $60,000 in moral damages as punishment for the bad faith and unfairness which it had exhibited in the manner in which it had terminated the employee.

This decision provides a stern warning to Ontario employers to avoid acting reprehensibly, or dishonestly, in the way in which they terminate employees**.**

Wood v Fred Deeley Imports Ltd., **2017 ONCA 158**

In February, the Ontario Court of Appeal also released an important decision clarifying for employers when the wording of a contractual termination clause is legally unenforceable and may therefore have to be updated.

In this case, the termination clause in the employer's employment contract explicitly restricted employees to only 2 weeks' notice of termination, or pay in lieu thereof, for each completed or partial year of service. The clause further stated that this contractual notice period would be inclusive of *all* the terminated employee's statutory entitlements under the *Employment Standards Act ("ESA")*, and that upon the termination of his employment, nothing more would be provided to him. The clause did not specifically address for how long the terminated employee would continue to be provided with benefits coverage, or whether he would be paid statutory severance pay.

The employer invoked this clause to terminate an employee who, at the time, had slightly more than 8 years of service, and who was therefore owed a total of 18 weeks of pay pursuant to the contractual termination clause, and 16.3 weeks in combined statutory termination and severance pay pursuant to the *ESA* itself.

Wishing to play it safe, the employer provided the employee with 21 weeks of notice, that is to say 3 weeks *more* than the amount required pursuant to the termination clause and over 4.5 weeks more than was required by the *ESA.* It did this by providing the employee with 13 weeks of actual working notice of termination and 8 weeks of pay in lieu of notice.

The employee refused to accept this cumulative 21-week severance package and instead sued the employer for full common law notice. She claimed that the wording of the contractual termination clause in her employment contract contravened the *ESA,* and was therefore unenforceable, because it failed to explicitly provide her with statutory severance pay and with any continued benefits coverage following her termination.

At the Court of Appeal, the employer argued that since the wording of the termination clause did not explicitly *preclude* terminated employees from receiving statutory severance pay or continued benefits coverage, it did *not* contravene the *ESA* and was therefore fully enforceable against the employee. In support of its argument, the employer pointed out that far from contravening the *ESA,* the clause actually provided for *greater* notice – 18 weeks – than the 16.3 weeks of combined notice of statutory termination and severance pay owing under the *ESA.*

The Court of Appeal rejected the employer's arguments. It ruled that the contractual termination clause contravened the *ESA* by failing to explicitly stipulate that the terminated employee would be entitled to receive statutory severance pay and continued benefits coverage for the statutory notice period, while nonetheless *also* stipulating that the termination clause was inclusive of *all* of the employee's entitlements.

Since the termination clause contravened the *ESA,* and was therefore unenforceable, the Court ordered the employer to pay the employee full Common Law notice of 9 months of wages and benefits.

In reaching this decision, the Court also indicated that it would strike down any termination clause which appears to provide the employee with working notice instead of statutory severance pay, or if even *one possible interpretation of the clause was to do just that*.

This decision of the Court of Appeal vividly illustrates just how strict Ontario's courts have recently become in their insistence that contractual termination clauses fully comply with *all* aspects of the *ESA*. The decision serves as a stark reminder to all employers of how essential it is, in 2017, that they arrange for the termination clauses in their employment agreement templates to be *regularly* reviewed and updated by legal counsel who are fully up to date with the latest judicial decisions of the Ontario courts. As the employer discovered in this particular case, the consequences of failing to do so can prove very costly for an employer's bottom line.

QUIZ: 'JUST HOW SAVVY ARE YOU AT HR?'

(Can you score 5 out of 5?)

IS IT TRUE THAT……

1. You must now give non-Christian employees paid days off to celebrate their own non-Christian religious holidays. True / False
2. Employers are now entitled to adopt mandatory retirement policies forcing their employees to retire at the age of 65. True / False
3. Overtime pay must be authorized by the employer, otherwise the employees are not legally entitled to claim overtime pay for overtime work which they perform. True / False
4. It is dangerous for employers to allege just cause for termination where the employee's misbehaviour clearly falls well below the high bar which the courts now set for just cause. True / False
5. If the employee's employment agreement contains a termination clause, then the amount which a court will award him/her on termination will usually depend on the age of the employee, his/her seniority within your organization's hierarchy, the number of years of service that he/she has worked for your organization, whether your organization induced him/her to leave secure prior employment and what income he/she has earned in the aftermath of his/her termination. True / False

(Answers on back page of this Newsletter)

ANSWERS TO QUIZ: 'JUST HOW SAVVY ARE YOU AT HR?'

1. **FALSE**: Employers are not legally required to actually *pay* their non-Christian employees for the days on which they absent themselves from work to celebrate their religious holidays. The Courts have ruled that employers must provide non-Christian employees with days off on these days, but have also ruled that they have no legal obligation to *remunerate* the employees on those days. Instead, the Courts have ruled that employers must provide those employees with scheduling options to enable them to take off those days without losing salary by permitting them to either switch work shifts or work overtime, or attribute unused paid sick leave to their religious holidays.

2. **FALSE**: As of December 2006, the Ontario Government amended the *Human Rights Code* to prohibit employers from forcing employees to retire after they had reached the age of 65. As a result of those 2006 amendments to the *Code*, it is now illegal to pressure an employee to retire at age 65 or at any age at all.

3. **FALSE**: Overtime pay must be paid to all employees who work overtime (unless they fall within an exempt category), *regardless of whether or not that overtime work was ever authorized*. This means that even an employee who works overtime after being explicitly forbidden to do so by his/her employer, is nonetheless legally entitled to insist on being paid overtime pay for his/her unauthorized work! Under Ontario law, the employer is liable for, and must pay, that employee overtime pay for all hours worked in excess of the Ontario overtime threshold of 44 hours per week, *even if that work was expressly forbidden by the employer*.

4. **TRUE**: It can be dangerous for an employer to allege just cause for termination where it lacks solid evidence of extreme misbehaviour. In *Wallace v United Grain Growers Ltd.*, the Supreme Court of Canada ruled that where an employer improperly alleges just cause for termination, it may be ordered to pay the employee significantly more in damages. The Ontario Superior Court has frequently made substantial punitive awards against employers who recklessly asserted just cause for dismissal where the employee's misconduct did not come close to justifying that assertion.

5. **FALSE**: If the employee's employment agreement contains a termination clause that is still legally valid and enforceable, then the amount of money which a court will award is simply the amount stated in that termination clause (no *more* and no *less*!). While some termination clauses tie the termination pay to the number of years which he/she worked with your organization, the amount of money payable *under those clauses* is never influenced by the employee's age or seniority within your organization's hierarchy, or by whether the employer ever induced him/her to leave secure prior employment.

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