LABOUR & EMPLOYMENT LAW NEWSLETTER

An 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…?

- You now have a legal duty to modify the daily work schedules of Muslim, Jewish, Hindu and other non-Christian employees to accommodate their religious practices. If any religiously observant employee requests additional days off to celebrate a religious holiday, you must comply with that request and give him or her the day off work;

- When your employees resign, they themselves must now provide *you* with reasonable notice of their decision to leave, failing which you may be able to sue them for damages arising from the disruption caused by their departure;

- In 2016, the Supreme Court of Canada issued a decision which now arguably makes it easier for Ontario employers to dismiss disabled employees when they can show that they had absolutely no prior knowledge of the employees' disability and no reasonable means of detecting disability;

- Also in 2016, the Ontario Legislature amended the *Accessibility for Ontarians with Disabilities Act* ("*AODA*") to require all Ontario employers to immediately provide *AODA* training to *all* of their employees who interact with customers; accordingly, if any of your employees have not yet undergone such training, you are now in breach of the law;

- Also in 2016, the Ontario Court of Appeal ordered an employer to reinstate a disabled employee (12) years after she had been terminated from her job and to pay her more than $600,000.00, representing *12 years of back-wages*;

- Also in 2016, the Ontario Court of Appeal similarly ordered another employer to pay one of its disabled employees more than $300,000.00 in damages and legal costs for harassment and failing to accommodate her disability;

- Employees who have been employed for at least 6 months are now entitled to take up to 37 weeks' of unpaid leave to provide care and support to a critically-ill child.

QUEEN'S PARK UPDATE:
The Most Significant New Regulatory Changes That Occurred in 2016

1. *Bill 132: Sexual Violence and Harassment Action Plan Act*

In March 2016, Bill 132 became law. Its provisions came into force on *September 8, 2016* and had to be fully complied with by that date. Bill 132 provides:

- A new definition of "*workplace harassment*" which includes "*workplace sexual harassment*" and excludes the reasonable management of a worker;
- A new obligation for employers to develop, maintain and review their written workplace harassment policy and program each year so as to address:
  - The reporting of workplace sexual harassment;
  - How future incidents and complaints will be investigated and dealt with;
  - How investigative information will be kept confidential; and
  - How employees are to be trained to comply with the policies.
- A duty for employers to investigate all incidents of workplace harassment and to inform both the victim and harasser of the results of that investigation, along with any corrective steps that are taken;
- That the Ministry can appoint an impartial third party to conduct an investigation at the employer's expense; and
- That employers who breach these provisions are subject to significant penalties and fines of up to $500,000.

2. *Amendments to the AODA*

Effective July 1, 2016, the following amendments to the *Accessibility for Ontarians with Disabilities Act* came into force:

- The definition of an exempted "*small organization*" was broadened to include organizations with between 1 and 50 employees;
- Private sector employers with fewer than 50 employees are no longer required to document and/or publicize their customer service policies nor to make them publicly available, nor to maintain training records;
- Going forward <u>all</u> employees, volunteers and other persons who provide goods, services or facilities to customers must take ongoing *AODA* training. Such training must be repeated whenever there are changes to the company's customer service policy;
- Organizations with 50 or more employees must now keep records of the training that they provide and must maintain a written record describing the training policy and the contents of the training;
- Organizations with 50 or more employees must now prepare a document describing the feedback process, which is to be disclosed to any person who requests a copy; and
- A notice that this document is available must be posted on the premises and/or website.

3. *2017 AODA Compliance deadlines*

On January 1, 2017, the next phase of provisions of the *AODA* comes into force. By that date "*small organizations*", consisting of 50 or fewer employees, must be compliant with the following employment standards:

- Employers must henceforth advise employees of its policies to accommodate disabled employees;
- When recruiting, employers must advise the public about the availability of accommodations and advise job applicants of their policies for accommodating persons with disabilities;
- Wherever requested to do so, employers must henceforth consult with disabled employees to provide accessible formats and communications support; and
- When providing performance management, career development or redeployment, employers must henceforth take into account the accessibility needs of employees.

4. *Bill 12: Amendment to the Employment Standards Act (regarding tips and gratuities)*

In June 2016, amendments to the *Employment Standards Act ("ESA")* prohibited employers from withholding, making deductions from or collecting tips or other gratuities from employees except as authorized under the *ESA.* In particular:

- Employers are allowed to withhold tips and gratuities only if they redistribute that money to their employees; and
- Any tips that an employer withholds will be deemed to be a "*debt*" owing to the employee which the Ministry of Labour will then forcibly collect from the employer as unpaid wages.

THE YEAR IN REVIEW:
The 10 Most Important Court Decisions of 2016 Affecting Employers

Here are 10 of the most significant decisions issued by the Ontario courts in 2016, relating to just cause, pay-in-lieu of notice, human rights and the enforceability of restrictive employment covenants, which will be of considerable potential importance to those who work in the HR field, in 2017.

JUST CAUSE: WHEN CAN YOU DISMISS AN EMPLOYEE FOR MISCONDUCT?

Fernandes v Peel Educational & Tutorial Services Ltd. 2016 ONCA 468

This past June, the Ontario Court of Appeal rendered a landmark decision on *just cause* which may prove to be of great assistance to employers wishing to dismiss one or more of their employees for misconduct in 2017.

In this case, a well-regarded teacher, with a long and unblemished teaching record was abruptly dismissed from his position when it was suddenly discovered that he had falsified his students' grades, and had initially lied to school authorities to try to cover up what he had done. His dismissal caused him to fall seriously and permanently ill. Since the false grades were eventually discovered and corrected, they did not actually cause the school any significant long-term harm.

Despite the employee's prior good record, 10 years of loyal service and serious resulting illness, the Court of Appeal ruled that his misconduct had provided just cause for his dismissal, and that his employer had therefore been fully justified in terminating him without notice or pay-in-lieu of notice. The Court concluded that there was just cause not only because the employee's attempts to conceal his misconduct had destroyed his employer's trust in him, but also because the misconduct itself had exposed the school to serious *potential* harm in that the falsification of the grades *could* have threatened the school's accreditation.

In its reasons for decision, the Court emphasized that when determining whether an employee's misconduct is serious enough to give rise to just cause for his dismissal, what matters is the *potential* harm which that misconduct *might* have caused the employer, rather than the *real* harm that *actually was* caused.

This relatively harsh decision should be of comfort to the many thousands of Ontario employers who feel frustrated over how difficult it has become to terminate employees for just cause. The Court of Appeal's ruling appears to confirm its near-zero tolerance for employees – no matter how long-serving - who try to conceal minor, but potentially harmful, acts of misconduct from their employers.

Morison v Ergo-Industrial Seating Systems Inc., 2016 ONSC 6725

This past October, the Superior Court released an important decision chastising employers who try to use the spurious threat of just cause to bargain with an employee.

In this particular case, the defendant employer had terminated a senior managerial employee with over 8 years of service, without immediately issuing him a Record of Employment (ROE) or paying him his statutory termination and severance pay as required by the *ESA.* Instead, the employer offered to pay the dismissed employee only 5 months' notice, and threatened to allege just cause for dismissal if he failed to accept this lowball offer.

Rather than capitulate to this threat, the employee sued for wrongful dismissal. The employer maintained its position that it had just cause to terminate the employee for over two and a half years. The Court ruled that the employer had alleged just cause for purely tactical reasons, in order to pressure the employee into accepting a lowball settlement, and that it had never had any sincere and reasonable basis for its assertion.

The Court also found that in so doing, the employer had acted in bad faith, and that its delay in issuing the ROE and in paying the employee his statutory termination and severance pay had caused him considerable harm.

As a result, the Court ruled that the employer's behavior towards the dismissed 8-year employee had been "*reprehensible*" and ordered it to pay him $50,000 in punitive damages in addition to *12 months* of pay-in-lieu of notice! This decision serves as a dire warning to employers of the risks of trying to play financial '*hardball*' with employees whom they decide to terminate.

PAY-IN-LIEU OF NOTICE: HOW MUCH MUST YOU PAY?

***Keenan v Canac Kitchens,* 2016 ONCA 79**

Last January, the Ontario Court of Appeal released an important decision clarifying the law on when employers must pay Common Law pay-in-lieu of notice to workers who are contractors rather than employees, and when such workers are deemed to enjoy "*dependent contractor"* status, rather than *"independent contractor*" status.
Non-employees are either independent contractors or dependent contractors. It is crucial for employers and their

HR staff to understand the distinction between the two, because at Common Law, dependent contractors are now entitled to considerable reasonable notice of termination, or very significant pay-in-lieu thereof, whereas independent contractors are *not*. As this decision demonstrates, terminating a dependent contractor can now be just as expensive as terminating a regular employee.

In this particular case, the plaintiffs were non-employee contractors who had worked for almost 20 years exclusively for the defendant employer, Canac, and who had subsequently worked for 3 years for *both* Canac *and one of its competitors*. During those final 3 years of simultaneously working for both companies, the plaintiffs had devoted approximately 66 - 80% of their working hours to working for Canac.

At the end of those 3 years, the plaintiffs were dismissed by Canac without reasonable notice, or pay-in-lieu of notice, on the basis that, in Canac's view, they were independent contractors and therefore not legally entitled to any notice. In support of its position, Canac claimed that they could not be *dependent* contractors because they had spent the last 3 years working part-time for another firm, rather than exclusively for Canac, and therefore could not be said to be truly *dependent* on Canac for their income.

The Court of Appeal rejected Canac's argument, ruled that the plaintiffs were dependent contractors, and ordered Canac to pay them, as non-employees, an eye-popping 26 months of pay-in-lieu of notice. The Court reasoned that while they may no longer have been working *exclusively* for Canac and were therefore no longer dependent *solely* on Canac for their income, they nonetheless had to be characterized as dependent contractors because in the months prior to their dismissal *most* of their income was still being paid by Canac.

The Court also ruled that when determining whether someone is a dependent or independent contractor, lower courts and employers must look at the *entire history* of the contractor's work relationship with the employer, rather than focus solely on a "*snapshot*" of that relationship as it may have existed on the date of dismissal. Looking at the full history of Canac's relationship with the plaintiff contractors, it was clear that for most of that relationship they had been very substantially dependent on Canac for their income. They were therefore entitled to very substantial pay-in-lieu of notice on dismissal.

***Gagnon & Associates Inc. et. al. v Jesso et. al.*, 2016 ONSC 209**

Also last January, the Ontario Superior Court released a decision defining *when* employees must give their employers notice that they are resigning from their jobs, and *how much* notice they must give.

While most people know that *employers* are legally required to provide their employees with reasonable notice of termination, what is less well-known is that those same employees have a similar reciprocal legal obligation to provide their employers with reasonable notice of their own decision to resign from their jobs.

In this particular case, two salesmen, whose collective efforts accounted for approximately 60% of their employer's total annual sales, had simultaneously resigned without advance notice to their employer, effective the very same day, in order to begin working for a competing company. Predictably, the suddenness of their resignation caught their employer by surprise, and had a highly disruptive impact on its business during the weeks which followed their departure. Accordingly, their employer chose to sue the two employees for the damage arising from that disruption and the Court allowed the claim.

In ordering the 2 employees to pay their former employer damages for this business disruption, the Ontario Superior Court confirmed that in Ontario, all employees have a legal duty to provide their employer with reasonable notice of termination of their employment. If the amount of such notice is not spelled out in an employment contract, it will be calculated based on the importance of the employee's position, the length of his service and the time it would reasonably take the employer to replace him.

The Court ruled that given that the 2 salesmen were responsible for a significant portion of their employer's sales, and that it was difficult to rapidly find replacements for them in their sales jobs, they should each have provided their employer with at least 2 months' notice of their resignation. In so doing, the Court ordered them to pay their employer $35,000 to compensate for the employer's business losses arising from their failure to provide the required notice.

Howard v Benson Group Inc., 2016 ONCA 256

This past April, the Ontario Court of Appeal released a decision which has significant potential consequences for how much notice of termination, or pay-in-lieu of notice, Ontario employers will now have to pay to employees who are on *fixed term* (not indeterminate) employment contracts.

In this case, the plaintiff, Howard, was a managerial employee who had been hired for a 5-year fixed term, pursuant to a contract which contained an early termination clause enabling the employer to terminate his employment at any time during those 5 years. After less than 2 years of work, the employer terminated Howard's employment. He sued for the 3 years' of wages which remained to be paid under his 5-year contract, claiming that, as a fixed term employee, he was legally entitled to be paid out the full balance which was still owing to him under the contract.

His employer argued that he was only entitled to the notice prescribed in the early termination clause or, in the alternative, to a couple of months of Common Law notice, because he had worked for the company for less than 2 years. The employer also argued that it could not possibly be liable to pay Howard the full 3 years of salary remaining under his fixed term contract because he had not tried to find alternate employment during this time.

The Court of Appeal overturned the decision of the Superior Court and awarded this 2-year employee the *full* amount owing for the more than 3 years which still remained on his contract, in the colossal amount of almost $200,000.00.

It ruled that in Ontario, whenever there is a fixed term contract without a legally valid termination clause, the fixed term employee is entitled, on termination, to the totality of the wages which he would otherwise have received for the *balance of the term of the contract*.

Even more importantly, the Court of Appeal also confirmed that in the case of fixed term employees, as opposed to employees who are employed for an indeterminate or indefinite term, an Ontario employer cannot ordinarily deduct any of the mitigation income which the employee earns elsewhere following the termination, *unless the fixed term contract contains wording explicitly entitling the employer to make that deduction*. According to the Court, employers are ordinarily required to pay fixed term employees the wages owing for the balance of the contract, even if they find another job at a comparable salary in the weeks following their termination and are thus effectively double-dipping during the notice period.

This decision illustrates the risks which employers assume when choosing to hire employees for fixed, rather than indefinite, terms of employment. Many HR staff assume that by hiring employees to fixed short term contracts, rather than to contracts of indefinite duration, they are reducing the company's risk and potential liability upon eventual termination of those employees. In fact, as this court decision proves, the exact opposite may be true, in that by signing an employee to a fixed term contract, the employer now potentially exposes itself to astronomically greater liability, unless the fixed term contract is carefully and expertly drafted so as to avoid the problems identified by the Court of Appeal in this and other decisions.

Paquette v TeraGo Networks Inc., 2016 ONCA 618

This past August, the Ontario Court of Appeal also released an important decision which clarifies when employers must pay annual bonuses to employees whose employment is terminated prior to year-end, as part of the pay-in-lieu of notice owing to them.

In this case, the employer terminated the employee prior to the scheduled date for payout of the bonus, and then argued that it was not required to pay him that bonus because his employment contract specifically precluded payment unless the employee was "*actively employed … on the date of the bonus payout*".

The Court of Appeal awarded the employee compensation equal to the bonus the employee would have earned had he worked for the duration of the notice period.

In so doing, the Court confirmed that employees who are terminated without just cause are entitled to be placed in the same financial position as if they had been provided with working notice, and to be compensated for any bonus which they would have earned had they been working during that period. The Court ruled that it is only in situations where the employment contract specifically and unambiguously limits the employee's right to receive compensation for the loss of the bonus, following termination, that the employer is relieved of its obligation to compensate the terminated employee for that loss.

As the Court found in this case, it is insufficient to simply insert into the employment contract a promise that the bonus only be payable if the employee is still '*actively employed*' at the time of the scheduled bonus payout.

This decision highlights yet again the importance of having carefully drafted employment agreements, without which employers can be forced to pay very large damages awards to their dismissed employees.

HUMAN RIGHTS: WHEN MUST YOU ACCOMMODATE AN EMPLOYEE?

***Miraka v A.C.D. Wholesale Meats Ltd.,* 2016 HRTO 41**

In January, a human rights tribunal delivered an important decision which clarifies the extent of an employer's duty to accommodate employees who have to absent themselves from work due to child care obligations.

In this case, an employee had missed three consecutive days of work – the first two days in order to look after his two young children and the third day because of pain arising from an untreated hernia. As a result of these absences, his employer terminated his employment due to what it described as his "*inability to attend work*".

The employee filed a human rights complaint alleging discrimination on the basis of family status. Before the Ontario Human Rights Tribunal, the employer argued that the complaint should be dismissed because the employee had failed to try to arrange alternative childcare, prior to taking off the first two days to stay home with his children and because he did not even notify them that he was taking the second day off.

The Tribunal ultimately found that the employer's termination of the employee was a breach of his right not to be discriminated against on the basis of family status and disability. It found that any infrequent, sporadic or unexpected need to miss work to take care of children is protected under the family status ground of the *Human Rights Code* and that this protection applied even though the employee had not made reasonable efforts to make alternative arrangements for the care of his children and had not sought prior approval for his absence.

This decision emphasizes that disciplinary action as a result of an employee's absence from work due to

infrequent and unexpected child care requirements is now illegal, under the *Human Rights Code, even where the employee has not made extensive efforts to find alternative childcare arrangements prior to taking the day off work*.

Hamilton-Wentworth District School Board v Fair, 2016 ONCA 421

This past May, the Ontario Court of Appeal released a sensational decision clarifying when employers must actually reinstate unlawfully dismissed employees into their jobs, rather than simply paying them notice.

In so doing, the Court upheld a Tribunal order requiring the employer to reinstate a disabled employee some *12 years after she had been terminated from her job*. The Court also ordered the employer to pay her $30,000 in human rights damages *and in excess of $600,000 in back wages;* that is to say all the wages that she would have earned since 2003 when the employer failed to accommodate her return to work following the conclusion of her disability leave, as required by the Ontario *Human Rights Code.*

In court, the employer argued that it should not be ordered to reinstate the dismissed employee due to the exceptionally long period of time that had elapsed since the employee's termination. The Court of Appeal rejected this argument on the grounds there was no evidence that the relationship had been fractured, that the passage of time had materially affected the employee's capabilities, or that the inconvenience suffered by the employer in belatedly having to give the employee back her job would cause it undue hardship. In so doing, the Court reaffirmed that human rights tribunals have broad remedial powers to order the reinstatement of employees who have been illegally terminated in breach of the *Code.*

This decision serves as a warning to employers not to assume that reinstatement is an unlikely legal remedy.

Strudwick v Applied Consumer & Clinical Evaluations Inc., 2016 ONCA 520

This past June, the Ontario Court of Appeal also issued a very significant decision warning employers that it may henceforth order them to pay far greater sums of money to compensate employees who have been the victims of human rights violations and abuse.

In this case, the employer refused to accommodate the disability of one of its hearing-impaired employees, and instead harassed her in an attempt to get her to resign. When the disabled employee didn't resign, the employer terminated her for alleged insubordination.

The Ontario Superior Court initially ordered the employer to pay the employee more than $113,000 in damages for pay-in-lieu of notice, human rights damages, mental distress and punitive damages, plus $40,000 in legal costs.

The Court of Appeal doubled this award, by ordering the employer to pay the employee damages of more than $246,000 together with a total of $60,000 in legal costs.

In its decision, the Court of Appeal suggested that it might have ordered the employer to pay even more money had the employee's lawyers not limited her claim to $240,000 plus benefits when they drafted her Statement of Claim. In so doing, the Court appeared to be sending a clear message that it now intends to award much larger sums of money than before against any employer who egregiously breaches or ignores the human rights of its employees.

RESTRICTIVE COVENANTS: WHEN ARE THEY INVALID?

Donaldson Travel Inc. v Murphy 2016 ONCA 649

This past August, the Ontario Court of Appeal released a decision which should serve as a wake-up call to employers to regularly update the non-competition and non-solicitation provisions in their employees' contracts.

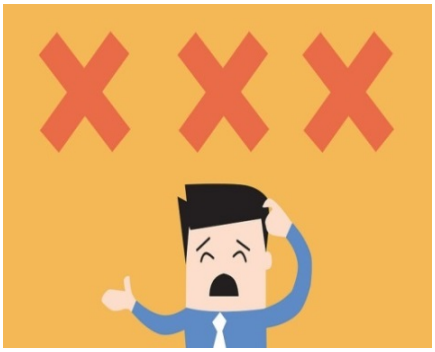
In this case, the employer had alleged that a former employee was in breach of the non-solicitation provision in her employment contract which required that she *"not solicit or accept business from any corporate accounts or customers…*" for an indeterminate period of time.

The employee argued that this provision was unenforceable because it restrained her ability to compete with her employer for an unlimited time-period. The employer countered that the provision was simply a prohibition against soliciting and should therefore be upheld, and in the alternative, that the Court should disregard the words "*or accept business from*" and enforce the remaining words which precluded solicitation.

The Court agreed with the employee that the words "*or accept business from"* transformed the provision into a non-competition clause of unlimited, and therefore unreasonable, duration and that accordingly, the provision was unenforceable against her.

The lessons to be drawn from this case are (i) that if a non-solicitation clause is worded to restrict an employee's future ability to "*accept business*" from someone, it is a non-competition clause and will only be enforced in very limited circumstances, and (ii) that any non-competition clause of unlimited duration will never be enforceable if challenged in court. The decision underscores the vital importance of having your non-competition and non-solicitation clauses regularly reviewed and revised by legal counsel to ensure their compliance with the latest court decisions.

THE 10 WORST HR MISTAKES OF 2016
(To Be Avoided At All Costs in 2017!)



1. **Letting *new* employees sign their employment agreements *after*, rather than *before*, they have arrived at the office for their first day at work;**
   [This can be a costly mistake because when a new employee signs the employment agreement after, rather than before, starting work, the agreement, and its termination clause, are generally unenforceable].

2. **Signing *current* employees to new and revised employment agreements without simultaneously providing them, in exchange, with fresh and improved financial consideration for the agreement;**
   [This is also a serious mistake because without fresh and improved financial consideration the agreement will not be enforceable and you will be unable to rely on its provisions].

3. **Letting employees sign and return their employment agreements to you, *on the very same day* that they first receive and read the agreement;**
   [In the long run, this is a fatal mistake because by doing this you risk the agreement later being held to be unenforceable on the grounds that the employee did not have the time to review and understand the agreement and give his or her informed consent of the terms. If this occurs, any termination clause is unenforceable].

4. **Assuming that employees are not legally entitled to collect overtime pay for overtime work which they were not authorized to perform.**
   [This is a serious mistake because under the Employment Standards Act employees are entitled to insist on being paid overtime pay regardless of whether their overtime work was authorized by the employer].

5. **Terminating the benefits coverage of an employee upon expiry of the statutory notice period (but before the Common Law notice period) without first securing a signed Release from that employee;**
   [This is a potentially ruinous mistake, financially, because where an employer terminates an employee's disability coverage before the expiry of the Common Law notice period without a Release, the Courts will order the employer to indemnify the employee for his loss, which can run into the hundreds of thousands of dollars].

6. **Assuming that a probationary employee can be terminated without notice or pay-in-lieu of notice, regardless of the wording of the probationary clause in his or her employment contract;**
   [This is another very serious mistake because a probationary employee can only be terminated without notice or pay-in-lieu of notice if the probationary clause in his or her employment contract explicitly provides for such termination without notice or pay, and it is carried out within the first 3 months of the probation period].

7. **Terminating an employee for performance-related reasons without first checking whether his or her poor performance might be partly the result of an unknown medical condition or disability;**
   [This is a dangerous mistake because under the Ontario Human Rights Code, employers may not terminate employees for performance problems which arise even partly from an undisclosed disability or medical condition whose symptoms were manifested at work, without first investigating those problems and attempting to accommodate the employee].

8. **Assuming that an employee can be terminated once he or she has been continuously absent on disability leave for more than 2 years;**
   [This is a very grave mistake because the Courts have ruled that the employment agreement is only frustrated, and therefore at an end, if and when there is satisfactory evidence that the employee is unlikely to return to work in the foreseeable future. In the absence of such evidence, the employer breaches the Human Rights Code and may be liable to the employee for damages].

9. **Terminating the services of a non-employee/dependent contractor without providing him or her with any notice or pay-in-lieu of notice;**
   [This is an expensive mistake because the law now requires that contractors who are not employees – if they are dependent primarily on your organization for their revenue – be provided with some notice of termination or pay-in-lieu of notice, unless the contract expressly says otherwise].

10. **Refusing to provide a reference letter to a terminated employee when he or she asks for such a letter and/or instead providing solely a *'confirmation of employment letter'*;**
    [This is a mistake because refusing to provide a reference letter may increase the employer's financial exposure for damages to that employee by considerably delaying his or her re-employment if the employee sues the employer for wrongful dismissal. As a general rule, an employer cannot be successfully sued for expressing its honest but subjective views about the employee in a reference letter, even if those views later prove to have been wrong].

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

(Can you score 4 out of 4?)

IS IT TRUE THAT……

1. Poor work performance by an employee can often amount to just cause for his/her termination. True / False
2. You can almost always force an aging employee to retire if you can prove that age is a *bona fide* occupational requirement for his or her job. True / False
3. Employees who earn a salary, rather than an hourly wage, cannot claim overtime pay. True / False
4. An employer cannot be found to have breached the *Ontario Human Rights Code* so long as it acts in good faith and in a reasonable and prudent manner. True / False

(Answers below)

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

1. **False**: Poor work performance rarely amounts to just cause for termination unless the employer can prove that the poor performance was mostly due to factors within the employee's personal control – such as his or her lack of effort or care – *and* that he or she was given multiple prior warnings and opportunities to improve.

2. **True**: An employer is entitled to terminate the employment of an aging employee where it can prove that age is a *bona fide* occupational requirement for the job, in that the occupation itself, by its very nature, requires exceptional physical and/or mental powers or reflexes, at a level that far surpasses the abilities of most older people, and where trying to accommodate those older employees is impossible, as it would put the public safety at risk.

3. **False**: In Ontario, all eligible employees who work in excess of 44 hours per week, are entitled to overtime pay, regardless of whether they are remunerated on an hourly basis or by a fixed annual salary. When it comes to overtime pay, there is no difference between a salaried employee and an hourly wage employee.

4. **False:** Good faith and reasonable prudence have little or nothing to do with whether a breach of the *Ontario Human Rights Code* has been committed. In Canadian law, ignorance by an employer of its legal obligations to its employees, even if well-intentioned, is no excuse and will prove to be no defence to subsequent legal claims.

CELEBRATING 70 YEARS
Soloway Wright lawyers

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