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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…?

- As of September 8, 2016, your organization was required by law to amend the definition of '*workplace harassment'* in its written workplace harassment prevention policy so as to include sexual harassment, and to exclude all reasonable actions taken by employers or supervisors "*relating to the management and direction of workers or the workplace";*
- As of September 8, 2016, the *Occupational Health and Safety Act* (*OHSA*) also requires you to have in place a *written program* for implementing your organization's workplace harassment prevention policy;
- Under the *OHSA,* your organization can be fined up to $500,000 for failing to put in place that written program or for failing to create an up-to-date and properly amended workplace harassment prevention policy;
- Your organization has a legal obligation under the *OHSA* to review, and wherever necessary to update, its written workplace harassment prevention policy at least once *each and every year;*
- When a consultant or contractor signs an agreement confirming that he or she is not an employee, that signed agreement does not necessarily preclude him or her from subsequently claiming termination pay or severance pay from you, nor does it preclude Revenue Canada from suing you for your failure to deduct Income Tax, EI and CPP from the pay cheques of the consultant or contractor;
- You may have grounds to terminate an employee where he or she works after-hours 'moonlighting' for a competitor or for someone with whom you do business, particularly where that work involves an inherent conflict of interest with his or her day job;
- This is so even where the employee's 'moonlighting' has not led to an *actual* conflict of interest, but merely to a situation where such a conflict *might potentially arise* at some future date.

JUDICIAL UPDATE:
The Most Important Court Decisions From The Last Six Months

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, as opposed to 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 end of her disability leave, as required by the Ontario *Human Rights Code.*

The employer had 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 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 employees capabilities, or that the inconvenience to the employer of 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 strong warning that employers who assume that reinstatement is an unlikely legal remedy do so at their peril.

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

This past June, the Ontario Court of Appeal 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 damages and punitive damages, as well as $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 (comprising $40,000 in human rights' damages, $35,000 in mental distress damages, $70,000 in aggravated damages, $55,000 in punitive damages, and more than $46,000 in pay-in-lieu of notice) 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 appears 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.

Donaldson Travel Inc. v. Murphy 2016 ONCA 649

In 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 knowledgeable legal counsel to ensure their compliance with the latest court decisions.

TIPS FROM THE TRENCHES:

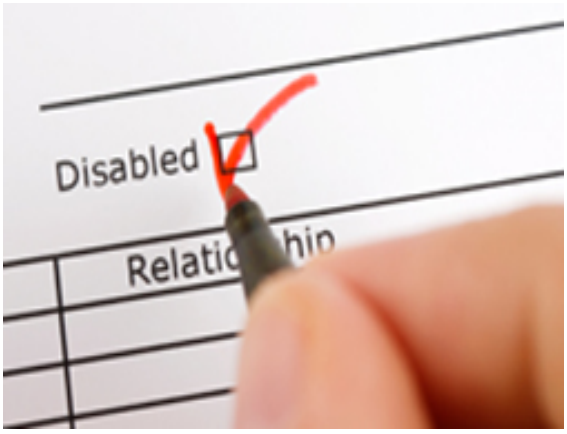
When Can You Safely Terminate An Employee Who Is On Disability Leave Or Sick Leave Without Breaking The Law?

There are few questions which create as big a headache for employers and HR staff as when, and *how*, to safely terminate the employment of an employee who is either *still on disability leave*, or who *has just returned* from such leave. For many, this question not only raises difficult issues of conscience but also the worry of being sued by the employee.

The cost of wrongfully terminating the employment of a *disabled* employee is exponentially greater than for wrongfully terminating someone who is *able-bodied*. If you wrongfully terminate the employment of an *able-bodied* employee, you normally face, at the very worst, an eventual court or tribunal order requiring you to pay that employee several months of reasonable pay-in-lieu of notice amounting, in most cases, to a relatively small sum of money. In contrast, if you wrongfully or prematurely terminate the employment of a *sick* or *disabled* employee before you are legally entitled to do so, the consequences are dramatically more severe. A court or tribunal may publicly declare your organization to have committed a breach of the *Code* and may order you to reinstate that sick or disabled employee into his or her job. In addition to undergoing this public ignominy, your organization may *also* be ordered to pay that sick or disabled employee *both* damages for breach of his or her human rights *and* back-pay running all the way back to the day of his or her termination, a year or two previously – a sum of money which can easily run you into the six figures ($600,000 in the 2016 decision of the Court of Appeal in *Hamilton-Wentworth,* see p. 2).

Once such a reinstatement order and costly order for back-pay have been issued, it becomes very difficult, if not practically impossible, to ever subsequently dismiss that sick or disabled employee a second time, with the result that he or she becomes effectively immune from future termination and will likely remain on your payroll for years to come.

Given these very severe consequences, employers and their HR staff need to thoroughly familiarize themselves with this aspect of the law before trying to terminate any employee who is on sick or disability leave, or who has recently returned from such leave.



Achieving such a thorough understanding is no easy feat. The difficulties of navigating this aspect of employment law to determine when you *can* and *cannot* lawfully terminate a sick or disabled employee has sometimes been compared to those experienced when navigating a ship at night, up a narrow channel, between two partially submerged shoals. In both cases, you risk serious damage!

I. THE GENERAL LEGAL PROHIBITION AGAINST TERMINATING SICK OR DISABLED EMPLOYEES

The Ontario *Human Rights Code* prohibits employers from terminating sick or disabled employees, except in very limited circumstances.

The *Code* makes it illegal not only to terminate an employee because of his or her sickness or disability, but also because of his or her *extended absence from work* or because of *problems in his or her work performance* which arise directly or indirectly from that sickness or disability.

In practice, this means that you normally cannot terminate someone's employment because he or she:

- is currently away from work due to a disability or serious illness; or
- has been performing poorly at work due to a disability or illness; or
- historically, has a poor attendance record due to any disability or illness.

Even if the termination of the disabled employee's employment was principally for legitimate business reasons that had little to do with the disability itself, a court is nonetheless legally obliged to set aside the termination as contrary to the *Code* if the employee's poor performance or attendance record, arising from the disability, played any role *whatsoever* in the decision to terminate*, no matter how minor*!

II. IN WHICH SITUATIONS CAN YOU LEGALLY TERMINATE A SICK OR DISABLED EMPLOYEE?

In Ontario, there are only 4 very limited situations where the law permits an employer to terminate the employment of a sick or disabled employee:

(i) Where the termination has absolutely nothing to do with the disabled employee's absenteeism or disability-related work performance;

(ii) Where the employee's illness or medical condition is not a recognized "*disability*" within the meaning of the *Code*;

(iii) Where the employee is so incapacitated by the sickness or disability that he or she is unable to carry out the core functions of his or her position, and appears unlikely to be able to do so for the foreseeable future, thereby causing the employment contract to be "*frustrated*"; and

(iv) Where, despite the employer's best efforts, the employee's absence on sick or disability leave, is genuinely causing the employer "*undue hardship".*

1st Permissible Basis for Termination: Where your termination of the disabled employee has nothing to do with his or her absenteeism or disability-related work performance

You can terminate the employment of a sick or disabled employee if your reasons for doing so are *totally unrelated* to his or her disability-related absence from work and *totally unrelated* to work performance problems arising from his or her illness or disability.

If the employee is part of a group of several able-bodied employees who are being laid off, then the fact that he or she happens to be sick or disabled does not prevent his or her layoff, given that the layoff would likely be found to be for reasons that are wholly unrelated to his or her disability or illness.

In such circumstances the employer's lay-off of the disabled employee will likely be found to be legal.

However, if it can be shown that the decision to include the employee in the group to be laid off was *partly* because of a poor attendance record, or *partly* because of performance problems arising from the disability or illness, then his or her layoff contravenes the *Code* and a court may order the employee to be reinstated into his or her job with back-pay.

Whenever you terminate the employment of someone who has a disability or serious illness, there is a legal presumption that the disability or illness probably played at least a minor role, directly or indirectly, in your termination decision. That presumption is rebuttable, but to successfully rebut it you need to be able to adduce some convincing evidence that the termination decision was in no way influenced by problems arising from the disability or illness. Often, such convincing evidence is unavailable.

2nd Permissible Basis for Termination: Where the employee's illness or medical condition is not a recognized "disability" under the Code

Somewhat paradoxically, Ontario law contains a loophole permitting you to terminate an employee because an illness is impeding his or her performance or attendance at work when that *illness is deemed to be of a transitory and non-serious nature.*

This is because the *Code* only precludes you from terminating someone's employment due to problems arising from a "*disability*".

Under the *Code*, not all illnesses or medical conditions are serious enough to amount to a recognized "*disability*" and accordingly you may terminate the employment of any sick employee whose sickness is not recognized as such.

Generally speaking, the *Code* does not recognize as a "*disability*" any illness which is both temporary in nature and "common place". For example, the flu, the common cold, gastroenteritis, strep throat, sinusitis, occasional work stress and many types of mild allergies are not recognized disabilities protected under the *Code*. Thanks to this legal loophole, you may lawfully terminate an employee for absenteeism or performance problems arising from any one of these relatively common, and transitory, medical conditions.

Employees may also be terminated for disability-related absenteeism or work performance problems where the worsening of their disability was caused largely by their own carelessness.

In *Ouimette v. Lilly Cups Ltd.,* an employee was dismissed for missing work due to her asthma. Although asthma is recognized as a disability under the *Code*, the Tribunal nonetheless ruled that the employer was legally entitled to dismiss the employee because she had carelessly and inadvertently contributed to her asthmatic reaction by taking a pain reliever containing aspirin, even though she had previously been advised that she was allergic to that drug.

While the employer would normally have been legally precluded from dismissing this employee due to absenteeism resulting from her asthmatic disability, the fact that she herself carelessly provoked the asthmatic reaction effectively legalized her termination.

3rd Permissible Basis for Termination: Where the employment contract is "frustrated" by the employee's sickness or disability

At the other extreme, where the employee's illness is of a serious and entirely non-transitory nature, you can still terminate his or her employment if that illness or disability is *so extremely serious and permanent* that it will likely prevent him or her from ever carrying out the principal duties of his or her job. In such situations, your written or verbal contract of employment with that disabled employee is deemed to have been legally "*frustrated*", or no longer capable of being carried out, due to the severity of his or her illness or disability. Subsection 17(1) of the *Code* expressly permits employers to terminate the employment of any person who "*is incapable of performing or fulfilling the essential duties or requirements"* of his or her job.

Two conditions must be present for the employee's employment contract to be "*frustrated*" by his or her sickness or disability: (i) the sickness or disability must appear to be permanent, rather than transitory; and (ii) it must prevent the employee from carrying out his or her principal or "*essential*" job duties.

(i) When will the sickness or disability appear to be sufficiently permanent that the employment contract is "frustrated"?

In *Yeager v. R.J. Hastings Agencies Ltd.,* the Ontario Superior Court ruled that an employee's continued absence from work for 2 consecutive years did not justify his employer's termination of his employment on the grounds of frustration of contract. Instead, as stated by the courts, the employment contract can only be said to be frustrated if there appears to be little likelihood of the employee ever being able to return within the foreseeable future.

Contrary to popular belief, an employment contract will not be deemed to be frustrated simply because the employee has been absent from work for several years. In *Yeager,* the Court warned employers against concluding that the length of an employee's absence from work could, *by itself,* provide grounds for terminating the employment of a disabled employee on the grounds that his or her disability is frustrating the contract. The Court articulated 5 factors which all employers must consider when trying to determine whether such frustration of contract really exists:

1. *The length of time that the employee has been employed* (The less time the employee has been employed, the more willing the court will be to conclude that the contract has been frustrated);
2. *Whether the employment was of temporary or permanent nature* (The more temporary the employment, the more willing the court will be to conclude that the contract has been frustrated)*;*
3. *The length of time that the employee has been absent* (The longer the absence, the more willing the court will be conclude that the contract has been frustrated)*;*
4. *Whether the employee's job can be temporarily filled by someone else* (The more difficult it is for the job to be temporarily filled by anyone else, the more willing the court will be to conclude that the contract has been frustrated)*;* and
5. *The likelihood of the employee recovering from his disability* (The less likely recovery appears to be, the more willing the court will be to conclude that the contract has been frustrated)*.*

(ii) When is the employee unable to carry out his or her "essential" job duties?

The employment contract is deemed to have been frustrated where the disabled employee is able to return to work, but can no longer permanently carry out the "*essential*" or "*core*" duties of his or her position, due to his or her disability. While employers have a legal duty to accommodate disabled employees by relieving them of their core duties on a temporary basis, and by providing them with modified duties on a permanent basis, their duty to accommodate does not extend to permanently relieving disabled employees of the core duties of their job. As stated by the Federal Court in *Holmes v. Canada (Attorney General):*

> "*The 'undue hardship' standard does not require that an employer act as a placement officer or create a new position expressly suited for the disabled employee comprising new duties that were previously non-existent and that do not suit its needs.*"

Once it becomes clear that the disabled employee is permanently unable to discharge the "*essential*" duties of his or her position, the employment contract is deemed to be frustrated, and the employer may lawfully terminate his or her employment on the grounds of his or her ongoing disability.

4th Permissible Basis for Termination: Where the employee's disability or illness is causing genuine "undue hardship" to the employer

Even where an employee's sickness or disability does not permanently prevent him or her from carrying out the "*essential"* or "*core"* duties of his or her position, his or her employment may nonetheless be terminated where his or her disability-related performance problems, or continued absence on sick leave/disability leave, would cause the employer "*undue hardship".*

Section 17(2) of the *Human Rights Code* prohibits employers from terminating their employees for absences from work arising from a disability or illness, or because of work performance problems arising from a disability or illness, unless and until it can be shown that continued accommodation of the absenteeism or poor work performance would cause "*undue hardship"* to the employer, due to "*the cost, outside sources of funding, if any, and health and safety requirements, if any".*

In practice, it is *extremely* difficult for Ontario employers to terminate an employee on the basis of "*undue hardship".* Proof of *some* hardship to the employer is not sufficient to justify a termination: rather what is required is evidence that the hardship is *so great* that it has become "*undue"* to the point of being virtually unsustainable.

In Ontario, the courts now require that before they can find an employer's hardship to be "*undue*", there must be proof that continued employment of the sick or disabled employee, and/or further attempts to accommodate his or her illness or disability, would result in an extraordinarily high, or objectively speaking, *unworkable* level of hardship.

As stated by various courts and tribunals, the following forms of hardship are not sufficiently "*undue"* to justify the termination of someone's employment:

- Mere business inconvenience in having to continue the disabled employee's employment;
- Reduction in employee morale as a result of having to deal with a co-worker's disability;
- Third party customer preference in not wanting to deal with a disabled employee; and
- Significant financial costs in having to cope with the employee's disability (According to the Ontario Human Rights Commission, such costs to the employer will only amount to "*undue hardship*" if they are "*so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability*").

This effectively means that most large or even medium sized employers will rarely be able to terminate the employment of a disabled employee on the grounds that the financial costs of maintaining his or her employment amount to "*undue hardship".*

III. WHAT PRECAUTIONS SHOULD YOU TAKE BEFORE TERMINATING THE EMPLOYMENT OF A SICK OR DISABLED EMPLOYEE

There are 2 essential precautions which all employers should take before attempting to terminate the employment of one of their sick or disabled employees:

1st Essential Precaution: Don't terminate the employee until you have made some effort to investigate and then accommodate the disability

You should never try to terminate the employment of a sick or disabled employee unless and until you have made some effort to investigate and accommodate his or her illness or disability. This is because pursuant to the *Code*, it is illegal to terminate a sick or disabled employee unless and until you have unsuccessfully tried to accommodate that illness or disability to the point of undue hardship. As stated by the Ontario Divisional Court in *ADGA v. Lane*, an employer cannot be said to have unsuccessfully tried to accommodate the illness or disability if it has not made any accommodation efforts at all.

As a result, no prudent employer should ever terminate a sick or disabled employee without first having investigated and tried to accommodate the disability or illness, since failure to do so may well result in an order requiring the employer to reinstate the dismissed employee with damages.

2nd Essential Precaution: Don't terminate the employee until you have gathered the necessary evidence of his or her future inability to work, or of your own "undue hardship"

A court or tribunal will declare your termination of a disabled employee to be unlawful unless you have either (i) medical evidence that he or she is unlikely to return to work at any point in the foreseeable future or (ii) objective evidence that further attempts to accommodate him or her will likely be unsuccessful or will cause your organization "*undue hardship*".

As stated by the Ontario Superior Court in *Naccarato v. Costco*, the onus of proof is on the employer to produce medical evidence that the employee's inability to return to work has frustrated the employment contract. As stated by the Supreme Court of Canada, the employer's evidence of undue hardship must be objective, real, direct and quantifiable and should therefore take the form of financial statements, scientific data and/or expert opinions.

In view of the very serious consequences of illegally and prematurely terminating employees who are on disability leave or sick leave, or who have recently returned from such leave, prudent employers would be wise to proceed with extreme caution whenever attempting to terminate the employment of such employees, and to seek legal advice from an employment law expert before commencing any such terminations. In most cases, the legal cost of a quick and pre-emptive consultation with an employment lawyer will be a tiny fraction of the cost which your organization could face if and when you inadvertently botch the termination itself by acting without proper advice and guidance.

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

(Can you score 5 out of 5?)

IS IT TRUE THAT……?

1. An employee can be terminated simply because he or she frequented an adult entertainment bar after-hours or because, outside of work, he or she committed an extramarital affair of which his or her employer personally disapproves. True / False
2. You can unilaterally place your employees on unpaid temporary layoff for as long as 35 weeks (about 8 months) in any given year so long as you maintain benefits coverage for those employees throughout that 35-week layoff period. True / False
3. The insertion of a non-competition or non-solicitation clause into someone's employment agreement can dramatically increase the pay-in-lieu of notice owing to that employee when he or she is ultimately terminated. True / False
4. Any termination clause in an employment agreement is invalid if it fails to clearly and unambiguously provide for continued benefits coverage during the period of statutory notice which is prescribed in the *Employment Standards Act*. True / False
5. Canadian employment law does not specifically preclude employees from 'moonlighting' by working for themselves or for another business after hours, unless this contravenes their employer's Code of Conduct or Employment Contract or involves an inherent conflict of interest with the employee's day job. True / False

(Answers on the back page of this Newsletter)

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

1. **True.** Such private activities are not protected by the *Ontario Human Rights Code*. Accordingly, an employer is free to dismiss employees who engage in such activities, without having to justify their dismissal, so long as they are paid reasonable pay-in-lieu of the notice.
2. **False.** The Ontario Superior Court and Court of Appeal have ruled that you can only place an employee on unpaid temporary layoff, pursuant to subsection 56(2) of the Ontario *Employment Standards Act*, if he or she agrees to take such unpaid temporary leave or if there is a long-standing corporate or industry practice of unpaid layoffs. Otherwise, and notwithstanding subsection 56(2), the layoff is unlawful and amounts to constructive dismissal of the employee, thereby triggering your legal obligation to pay him or her statutory termination pay, statutory severance pay (if applicable) and pay-in-lieu of notice.
3. **True.** When your organization inserts such clauses into an employment agreement, it runs the risk of significantly increasing the pay-in-lieu of notice which must be paid to the employee when he or she is subsequently dismissed. The Ontario Superior Court often assesses the dismissed employees reasonable notice at roughly equal to the time period prescribed in the non-competition or non-solicitation clause.
4. **True.** The Ontario Superior Court has repeatedly stated that any termination clause which fails to provide, explicitly or implicitly, for continued benefits coverage during the period of statutory notice prescribed in the *ESA* is invalid. In such cases, the employer is legally obliged to pay the terminated employee full common law pay-in-lieu of notice just as if the termination clause had never even existed in the first place. That common law pay-in-lieu of notice can amount to as much as 1-3 months per year of service.
5. **True.** Where the moonlighting contravenes the employer's Code of Conduct or the Employment Contract, or where there is an inherent conflict of interest created by the moonlighting, the employer may have just cause to terminate the moonlighting employee without notice or pay-in-lieu of notice. In all other situations, however, the employee may be legally entitled to 'moonlight' during his or her off-duty hours.

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