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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

IN THIS ISSUE

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 may be able to dismiss an employee for boorish comments which he posts after-hours on his own social media account, if those private posts detract from your firm's public image;
- You cannot be successfully sued for what you write about an employee in a reference letter, when what you say about him or her later proves to be wrong, if you mistakenly believed your comments to be true and were not reckless about the truth when you wrote them;
- Employers are now legally required to accommodate the daycare arrangements of their employees by changing their work schedule, or work shifts, to permit them to drop off, and pick up, their children at daycare;
- You can terminate an employee who engaged in purely personal activities with which you disagree, such as extra-marital affairs or frequenting strip joints, if such off-duty private behaviour runs contrary to your organization's social values, because such behaviour is not protected by any labour or human rights laws;
- Any employer who deals too swiftly with alleged sexual harassment, by disciplining or dismissing the alleged harasser without properly investigating the complaint and providing him with the opportunity to defend himself, potentially exposes itself to significant financial liabilities;
- As a result of recent developments in Ontario law, many termination clauses which used to be legally valid are now void and unenforceable;
- Any termination clause in an employment agreement is now void if it fails to clearly and unambiguously provide for continued benefits coverage during the period of statutory notice prescribed in the *Employment Standards Act*;
- In the absence of a legally enforceable termination clause, dismissed employees can be entitled to notice or pay in lieu of notice, of as much as 1, 2 or 3 months per year of service.

QUEEN'S PARK UPDATE:
Important New Regulatory Changes Of The Past Few Months

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

On October 27, 2015, the Ontario government introduced a bill at Queen's Park to strengthen various provincial laws against sexual violence and harassment. The new bill amends 6 different provincial statutes, including the *Occupational Health and Safety Act* by enacting:

- **A new definition of workplace sexual harassment** defined as (a) "*a course of vexatious comment or conduct against a worker because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known, or ought reasonably to be known, to be unwelcome*", or (b) "*making a sexual solicitation or advance where the person is in a position to confer or deny a benefit or advancement to the worker and he or she knows, or ought reasonably to know, that the solicitation or advance is unwelcome*". This new definition of workplace harassment excludes vexatious conduct which relates to the management, direction or supervision of the workplace or the workforce;
- **A new requirement that employers explicitly prohibit workplace sexual harassment** in their existing workplace harassment policies;
- **A new requirement that employers investigate all incidents/complaints of workplace harassment.** Both the complainant and respondent must be informed in writing of the investigation results and any corrective action that is to be taken;
- **A new obligation for employers to review the program they have in place for implementing their workplace harassment policies each year,** and permitting the Ministry to appoint an impartial third party to conduct a workplace investigation at the employer's expense.

2. *Bill 143, Employment Standards Amendment Act (Temporary Help Agencies), 2015*

On November 18, 2015, the Ontario government introduced a bill which will significantly impact temporary help agencies. Once enacted into law:

- All temporary help agencies will henceforth be required to obtain an operating licence from the Ministry;
- Agencies will be required to pay their assignment employees at least 80% of what they charge their clients, thereby reducing profit margins to 20% or less;
- Agencies will be required to deliver semi-annual reports on the number of hours worked by each assignment employee for each client;
- The hours worked by assignment employees will not be permitted to exceed 25% of the total workhours clocked by the workforce of any Ontario employer, unless that employer has fewer than 10 staff, or has had an increase in business volume which is purely temporary, or has obtained an exemption from the Ministry of Labour.

3. *Bill 129, Human Rights Code Amendment Act (Genetic Characteristics), 2015*

On October 8, 2015, the Ontario government introduced a bill which will add to the prohibited grounds of discrimination enumerated in the Ontario *Human Rights Code,* by prohibiting employers from discriminating against employees on the basis of their "*genetic characteristics*", that is to say, any genetic traits of an individual, including traits that may cause or increase the risk to develop a disorder or disease. If passed, it will be unlawful to discriminate against employees for refusing to undergo, or disclose to their employers, the results of any genetic test.

4. *Accessibility for Ontarians with Disabilities Act, 2005*

On January 1, 2016, new provisions of the *Accessibility for Ontarians with Disabilities Act* come into force. By that date any "large organization", consisting of 50 or more employees, is required to have made itself compliant with the *Act's* new mandatory employment standards for disabled employees, or face sanctions. Some of the highlights of those new mandatory standards include:

- A new obligation, when recruiting for a position, to alert job applicants of the availability of accommodation for disabled applicants;
- A new obligation to inform existing staff of policies to accommodate disabled employees;
- A new requirement to provide disabled employees with accessible formats and communications support;
- A new obligation to develop a written return to work process for employees who have been absent from work due to disability; and
- A new requirement to account for the accessibility needs of disabled employees in performance management evaluations.

EMPLOYERS TAKE NOTE:
You Must Now Provide Additional Holidays to Employees Who Adhere to Non-Christian Religions

One of the big questions facing employers in 2016 is how far to go in accommodating the religious practices of devout Muslims, Jews and other religious minorities in the workplace. This is a potentially explosive issue, as witnessed by the passions raised in the last federal election, when the Harper government implicitly invited voters to weigh in on whether Muslim women ought to be permitted to wear *niqabs* to citizenship ceremonies.

Much the same question now extends into the workplace. As an employer, must you now permit Muslim employees to wear the *niqab* to work? Do you also have to give them time off work, several times a day, to perform their prayers, as all observant Muslims are encouraged to do in the *Qur'an*? Can your Jewish employees insist on your providing paid days off for Hannukah, and then working on Christmas or Easter?

Such is the dilemma now facing HR managers across Canada in 2016 just as the country seeks to integrate into its workforce some 25,000 Syrian refugees, most of them Muslims. The Ontario *Human Rights Code* explicitly prohibits an employer from discriminating against Muslim, Jewish and other employees on the basis of '*creed*' or religion, unless it can show that such discrimination is necessary to prevent "*undue hardship"* to itself and its business. But in practice, trying to determine when a religious custom is really part of a "*creed",* and when accommodation for believers in that "*creed"* genuinely gives rise to "*undue hardship*" for the employer, can be a highly complex task for even the most legally sophisticated HR staff.

In 2016, that task facing HR managers will be further complicated by the highly subjective test traditionally adopted by Canadian courts for determining when an employee's personal beliefs or customs should be protected under the guise of 'freedom of religion'. That test is not whether the practice or custom is rooted in any recognized religious text, such as the *Qur'an* or the *Talmud,* but instead simply *whether the employee sincerely believes that the custom is fundamental to his or her own interpretation of that religion.* In other words, even an uncommon custom followed by a small handful of believers is protected by the *Human Rights Code,* if their convictions are sincere, *even though that custom has been overwhelmingly rejected by most mainstream adherents of that same religion!*

Consider the following questions:

Can religiously devout employees be forced to follow a secular dress code at work?

Under the *Human Rights Code* there are strict requirements for employers seeking to enforce secular dress codes on religiously devout employees. To force a devoutly religious employee to abide by a dress code, in violation of her religious practices, you must be able to prove that your restrictions on what she wears are a *bona fide* occupational requirement of the job and that her failure to abide by them would result in health and safety issues.

However, even if there is a valid health and safety rationale for the dress restrictions you are seeking to enforce, the law still requires that you take steps to accommodate the employee up to the point of suffering '*undue hardship*' in your business.

These protections cannot be stretched further than is required by the tenets of the employee's religion. By way of illustration, in *Audmax Inc. v Ontario Human Rights Tribunal*, the Muslim complainant insisted on wearing an exotically coloured hijab to her work, in contravention of her employer's dress code. When her employer objected to her wearing that hijab to work on the grounds that it constituted a distraction to others, she filed a complaint against her employer under the *Human Rights Code.* Ultimately, the Divisional Court sided with the employer and dismissed her human rights complaint on the grounds that what the dress code prohibited was not her right to wear a hijab, but rather her right to wear a hijab *of that particular type*. The Court reasoned that since the dress code only prevented the employee from wearing a hijab of that flamboyant colour and shape, and not another hijab of more modest hue, there had not been any breach of her religious rights. According to the Court, a Muslim employee's religious freedom to choose to wear a hijab does not extend to guaranteeing her a choice of which colour or shape of hijab to wear.

In rendering this verdict, the Divisional Court upheld the legal right of employers to force even the most devout Muslims and Jews to fully comply with corporate dress codes to the extent that this does not impinge on their core religious beliefs.

Must you give non-Christian employees extra days off to celebrate their own religious holidays?

Employers are now required to allow devoutly religious employees to take days off to celebrate their own religious holidays. In *Markovic v Autocom Manufacturing Ltd.*, the Ontario Human Rights Tribunal stated that the adherents of all faiths must be permitted to observe their own particular holy days by not working those days. The Supreme Court of Canada has further ruled that it is now unlawful for employers to adopt a work calendar which gives Christian employees time off at Christmas and Good Friday without permitting employees from other religions to similarly take time off to observe their own separate holy days.

The law is murkier on the issue of whether employers are required *to pay* their non-Christian employees for the days on which they absent themselves from work to celebrate their religious holidays. Both the Courts and the Ontario Human Rights Tribunal have ruled that employers have no legal obligation to actually *remunerate* non-Christian employees on those religious holidays unless their employment agreement provides for general paid leave which can potentially be used, at will, for absences from work. However, they have ruled that employers must provide those employees with scheduling options to enable them to take off those days without losing salary. The following are examples of options suggested by the Courts and the Tribunal:

- Permitting the devout employee to switch work shifts with employees of other religious faiths;
- Permitting him or her to work overtime, or through a series of lunch hours for the purpose of subsequently attributing that banked paid overtime to the day of their religious holiday;
- Permitting him or her to use any unused paid sick leave or compassionate care entitlement which he or she may have.

In *Markovic*, the Tribunal expressly rejected the position that employers are required to give non-Christian employees two additional paid days off to mirror the Christian holidays of Christmas and Good Friday. But in *Commission scolaire régionale de Chambly v Bergevin* the Supreme Court ruled that an employer cannot bar an employee from using paid discretionary leave days to celebrate their holy days.

Must you modify the daily work schedule of non-Christian employees to accommodate their religious practices?

Your legal duty to accommodate the religious practices of your employees requires you to show flexibility in their work schedules. By way of illustration, a devout Muslim must be given time off to pray several times per day; similarly, during the winter, devout Jews must be permitted to leave work early enough each Friday afternoon to safely reach home before sundown. This principle was emphasized by the Ontario Human Rights Tribunal in Q*ureshi v G4S Security Services,* where the Tribunal found an employer had breached the *Human Rights Code* by having failed to accede to a scheduling change request from one of its Muslim employees who wanted time off to pray on Fridays. The Tribunal stated that the employer had a legal duty to change the schedule so that the employee could attend Friday prayers.

Do non-Christian employees have a right to insist on working during the Christmas and Easter holidays?

For the moment, non-Christian employees do not have the legal right to insist on working on Christmas and Good Friday. In *Markovic,* the Tribunal stated that although Christmas and Good Friday were traditionally Christian holidays, they have now become secular pause days in modern society. The *Employment Standards Act* defines these days as public holidays, and under the *Act* no employer can be forced to do business, or permit its employees to work on those days just because they wish to do so. Since staff who elect to work on those public holidays must be paid premium pay equal to approximately 2.5 times their salary, the financial repercussions on all employers could be very severe if non-Christians were allowed to insist on working on those days.

Moreover, given that the *Retail Business Holidays Act* prohibits many retail businesses from carrying on business on Christmas and Good Friday, allowing non-Christian employees, in that sector, to insist on working on those days could put their employer into contravention of that *Act.*

In 2016, employers would do well to tread carefully when dealing with requests for religious accommodation from employees who are of Muslim, Jewish and other non-Christian backgrounds. Failure to accommodate the religious practices of these employees to the point of undue hardship will cause you to run the risk of a costly lawsuit, harmful to your organization's public image and financial bottom line.

In this area, the caselaw is in constant and rapid evolution. For that reason, a wise HR manager who wishes to minimize the risk of such a lawsuit ought to consult an experienced employment and human rights lawyer, before responding to the accommodation requests from any of her religiously devout employees.

THE 10 WORST HR MISTAKES OF 2015: (To Be Avoided At All Costs in 2016!)

1. **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].
2. **Terminating the services of a non-employee/contractor without providing him 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].
3. **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].
4. **Terminating an employee for performance-related reasons without first checking whether 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].
5. **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].
6. **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].
7. **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 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].
8. **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].
9. **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].
10. **Letting new employees sign their employment agreements after, rather than before, they have arrived at the office for their first day at work;**
    [This too can be a costly mistake because when a new employee signs the employment agreement <u>after</u>, rather than <u>before</u>, starting work, the agreement, and its termination clause, are generally unenforceable].

THE YEAR IN REVIEW:
The Most Significant Court Decisions of 2015 for Employers

One of the most significant decisions of 2015 was Potter v New Brunswick Legal Aid Service Commission, released by the Supreme Court of Canada in March. That decision is summarized in the Summer 2015 issue of our Newsletter (See Volume #3, Issue #4), which may now be viewed on our website at solowaywright.com. Here are four other 2015 court decisions which will be of significance in the HR field in 2016:

***Michela v St. Thomas of Villanova Catholic School*, 2015 ONCA 801**

This past year, the Ontario Court of Appeal released a very significant decision which will influence how much notice Ontario employers must pay when downsizing or restructuring their workforce in 2016.

In this case, 3 teachers were released from their employment when their school was unable to renew their contracts due to low enrollment. In Court, the employer argued that its unfavorable financial situation should be taken into account when determining how much notice ought to be paid to the dismissed employees, and that argument was initially sustained by the Ontario Superior Court. It ruled that although the dismissed employees would normally each be entitled to 12 months' notice, this should be halved to only 6 months due to the poor financial circumstances of the employer and its consequent difficulty in paying so much money.

The Ontario Court of Appeal overturned this ruling and awarded the employees the full 12 months' pay in lieu of notice, stating that while an employer's financial circumstances may constitute a valid reason for *terminating* an employee, they are never relevant to how much notice *must be paid* to him. In so ruling, the Court rejected a past line of caselaw which had suggested that such circumstances could indeed be relevant. According to the Court, the factors used to calculate the notice period of any dismissed employee must always be based on the circumstances of that employee, and not on those of his employer.

Wilson v A.E.C.L., 2015 FCA 17

Earlier this year, the Federal Court of Appeal handed down a key decision finally clarifying the contradictory and confusing state of the law regarding whether, and when, federally regulated employees can be terminated on a without just cause basis. In so doing, the Court made it easier for federally regulated employers to now terminate their employees.

In this case, a federally regulated employee who had been dismissed without cause challenged his employer's right to terminate him and filed an unjust dismissal complaint pursuant to section 240 of the *Canada Labour Code*. His complaint was upheld by the adjudicator on the grounds that the *Code* only permits dismissals with cause and that any dismissal of a non-managerial employee with 12 or more months of service, without cause, was automatically unjust within the meaning of the *Code*.

That decision was ultimately appealed to the Federal Court of Appeal, which ruled that the adjudicator was wrong, and that a dismissal without cause is not automatically unjust under the *Code*. It went on to state that whether such a dismissal is unjust will depend on whether it was based on caprice, convenience or personal bias, and whether it was unnecessary for the effective operation of the employer's business.

The Court of Appeal also reaffirmed that federally regulated employers who terminate their employees without just cause must pay them reasonable Common Law notice because the *Code*, just like provincial employment standards legislation, does not displace the Common Law.

It should be noted that leave has been granted for an appeal to the Supreme Court of Canada, so this may not yet be the final word on this issue.

T.(O.P.) v Presteve Foods, 2015 HRTO 675

This year, the Human Rights Tribunal set a new high water mark in general damages awards against employers for breaches of the *Human Rights Code*.

In this ground-breaking case, the two employees who launched the complaints were migrant workers from Mexico who had come to work in Ontario on temporary work visas. Throughout their employment,

over an extended period of time, they had been subject to ongoing unwanted sexual solicitations, and even sexual assault, at the hands of their employer. When the employees resisted his sexual advances, the employer repeatedly threatened to send them back to Mexico unless they submitted to him.

In its decision, the Tribunal found that the vulnerability of the employees, and the duration of the employer's behavior warranted an unprecedented award of damages. Prior to this award, the highest award against an employer for general damages for breaches of the *Code* had been $50,000.00. The Tribunal shattered this record by ordering the employer to pay $200,000.00 ($150,000.00 to one employee and $50,000.00 to the other) making the employer and his firm jointly liable for the award.

Zambito v LIUNA Local 183, 2015 HRTO 605

Earlier this year, the Human Rights Tribunal rendered a decision in which it found that employers will not be held liable for discrimination simply because the results of their investigation into the complaint later prove to have been wrong.

In this case, an employee of Italian/Sicilian origin had filed a workplace harassment complaint against a co-worker alleging that he had been harassed because of his national origin. The employer appointed its in-house counsel to conduct the investigation into the harassment complaint – a lawyer who had no prior relationship with either the complainant or the alleged harasser and who was experienced in dealing with human rights issues. Prudently, the investigator met with the complainant, the alleged harasser and all relevant witnesses, just as he was supposed to do.

At the conclusion of his investigation, the investigator determined that both the complainant and the harasser were at fault and recommended sanctions against each employee. Based on this investigation, the employer gave both individuals verbal warnings.

The complainant challenged the employer's decision by filing a human rights complaint with the Tribunal alleging that the employer failed to take adequate steps to respond to, and address, his complaint.

In its decision, the Tribunal dismissed the employee's complaint on the basis that the employer's investigative actions appeared reasonable in the circumstances. It stated that although it would have made different findings, the employer was not liable for violating the applicant's rights under the *Code* because no employer is legally required *to be correct in its investigative findings*; it is only required to reach a reasonable outcome following a prompt, thorough and impartial investigation into the complaint.

The Tribunal went on to outline the requirements that an employer must meet in order to fulfill its investigative duties under the *Human Rights Code.* For the employer's investigation to be reasonable, and therefore legal, it must show that: (1) it had an awareness of discrimination issues; (2) a policy and a complaint mechanism were in place; (3) the employer took the complaint seriously and acted promptly; and (4) a reasonable resolution was provided.

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

(Can you score 5 out of 5?)

IS IT TRUE THAT……

1. Employees can agree to contract out of claiming overtime pay for the overtime work which they perform. True / False

2. If you demote a recently hired employee to a slightly lower position, without reducing his remuneration or causing him significant humiliation, he must generally either accept the demotion, or resign without pay in lieu of notice. True / False

3. When a consultant or contractor signs an agreement confirming to you that he is not an employee, this does *not* preclude him from subsequently claiming termination pay or severance pay from you. True / False

4. When terminating employees and providing them with pay in lieu of notice, the lump sum payment method is generally most suitable for all employees. True / False

5. Where an employer improperly alleges just cause for termination, it may be punished by being ordered to pay the dismissed employee more in damages. True / False

(Answers on the back page of this Newsletter)

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

1. **FALSE:** Pursuant to subsection 5(1) of the *ESA*, employees cannot agree to work future overtime hours at a rate lower than 1.5 times their regular rate of pay and any contractual agreement to do so is null and void. Under the *ESA* any such agreement is illegal and therefore unenforceable.

2. **FALSE:** If you demote a recently hired employee to a lesser position, then that usually amounts to constructive dismissal even if his remuneration and hours of work remain the same, and even if the new work is not objectively demeaning. In such cases, a court will usually rule that the recently hired employee's duty to mitigate his damages does not require him to continue working in the demoted position in the same way as if he was a longstanding employee.

3. **TRUE:** In determining whether or not a consultant or contractor is *an employee*, both the Ministry of Labour and the courts look at the reality of your work relationship with that individual, and not just at the title which you and he have agreed to give him. Accordingly, if he signs an agreement confirming to you that he is not an employee, this does *not* necessarily preclude him/her from later successfully claiming termination pay or severance pay from you.

4. **FALSE:** In a normal job market, the salary continuation method of payment is the most economical method to use when terminating long-serving employees who are still relatively young and re-employable (and who are likely to earn replacement income during their relatively lengthy notice period).

5. **TRUE:** The courts have frequently made substantial awards against employers which recklessly asserted just cause for dismissal where the employees' misconduct did not come close to justifying that assertion. For that reason, a prudent employer should reflect carefully before deciding to assert just cause for its termination of any employee.

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