Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers

Emond Harnden LLP

THE BREAKFAST GRILL
LABOUR AND EMPLOYMENT LAW
OVER EASY

April 22, 2004

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UPDATE ON WRONGFUL DISMISSAL DAMAGES

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DAMAGES FOR WRONGFUL DISMISSAL

- Recent decisions demonstrate increased willingness to grant large damage awards
- Reasonable notice
  - *Bardal* factors – length of service, age, character of employment, availability of similar employment
- *Wallace* damages
  - Extension of the notice period for employer bad faith conduct
- Mental distress (aggravated) damages

WALLACE FACTOR

- How much will the notice period be extended?
  - Left up to the trial judge to determine
  - Judge will examine the nature of bad faith conduct and impact on employee's circumstances
  - No uniform approach by courts
    - Courts have awarded a notice period attributed to reasonable notice and notice period attributed to employer's conduct – a "bump up"
    - Courts have blended reasonable notice and *Wallace* together

WALLACE FACTOR

- Employer should refrain from engaging in conduct that is
- Unfair; or is in
- Bad faith by being, for example
  - Untruthful
  - Misleading
  - Unduly insensitive

LIMIT ON WALLACE DAMAGES
Ontario Court of Appeal Clarifies Application

Gismondi v. City of Toronto (2003)

- leave to appeal to S.C.C. denied February 19, 2004

- 20-year managerial employee
- Lost position as Director of Roads and Sidewalk Operations following municipal amalgamation and restructuring
- Required to compete for 5 manager positions
- Following interview, informed his performance appraisals would be reviewed and references contacted. Never done

Gismondi v. City of Toronto
At Trial

- Gismondi was unsuccessful in the competition. He turned down a severance package (80 weeks) and sued for wrongful dismissal
- Trial judge noted that while employer's conduct was "not malevolent, and probably well-intentioned" it had caused the hiring process to go "off the fairness rails"
- Trial judge described manner in which competition was conducted as "sloppy"
- Awarded 116 weeks notice which included an unspecified amount for *Wallace* damages

Gismondi v. City of Toronto (Ont. C.A. – 2003)

- Appeal allowed. Court reduced notice from 116 weeks to 80 weeks, as initially offered
- Court clarified – to attract *Wallace* damages – requires presence of something "akin to intent, malice or blatant disregard for the employee"
- No evidence that Gismondi suffered any specific harm

Gismondi v. City of Toronto (Ont. C.A. – 2003)

- Court noted that if grounds existed to extend notice period, these would have been the employer's failure to review performance evaluations and references and Director's consultation with the competitor's referee
- Good news for employers
  - Sloppy, well-intentioned conduct is insufficient to claim *Wallace* damages

MORE DAMAGES

- Mental distress (aggravated) damages
- Punitive damages
- Tort of intentional infliction of mental suffering:
  1. Flagrant or outrageous conduct
  2. Calculated to produce harm; and
  3. Resulting in a visible and provable illness
- Separately actionable course of conduct is required

MENTAL DISTRESS DAMAGES
Two Cautionary Tales

- *Zorn-Smith v. Bank of Montreal* (Ont. S.C.J. – 2003)
- *Montague v. Bank of Nova Scotia* (Ont. C.A. – 2004)
  - Leaves to appeal to S.C.C. filed March 2004

Zorn-Smith v. Bank of Montreal (Ont. S.C.J. – 2003)

- Ottawa-area bank employee terminated without notice after 21 years of service
- Judge found Zorn-Smith's disability caused by "unreasonable work demands"

Zorn-Smith v. Bank of Montreal
Judge Awarded

- 16 months notice extended by the addition of *Wallace* damages for Bank's bad faith and unfair treatment
- Three months of disability payments (not deductible from notice award)
- $15,000 compensation for the intentional infliction of mental suffering
- Special damages for tax consequences and loss of investment opportunity due to Zorn-Smith having to cash in her RRSP's (approximately $15,000)
- Declined to award punitive damages

Zorn-Smith v. Bank of Montreal
Trial Judge's Findings

- Bank allowed workplace to become damaging to Zorn-Smith's health and instead of taking responsibility for this state of affairs, it blamed the employee
- Bank applied a higher standard for "disability" than the one in its STD policy
- Bank did not contact Zorn-Smith's physician, despite his request that he be contacted for further information
- Bank failed to advise Zorn-Smith about how to appeal its termination decision, or what further medical information it required of her

Zorn-Smith v. Bank of Montreal
Trial Judge's Findings

- Bank knew that Zorn-Smith was exhausted as a result of chronic under-staffing yet, rather than taking action to alleviate the situation, took advantage of her commitment to the Bank in total disregard of the toll this was taking on her health and family life
- "callous disregard for the health of an employee was flagrant and outrageous"

Montague v. Bank of Nova Scotia (Ont. C.A. – 2004)

- Montague terminated from employment as a data entry operator after 15 ½ years, earning $24,000
- Montague fell at work, injuring her shoulder
- Returned to work on modified duties, fell again injuring her lower back
- Claim for LTD was denied by administrator of Bank's plan because it was inadequately supported by the available medical information
- Bank advised Montague that it expected her to return to work or she would be deemed to have abandoned her employment

Montague v. Bank of Nova Scotia (Ont. C.A. – 2004)

- Medical controversy over whether Montague could do the keypunch work required by her regular job. Bank had a number of medical reports from Montague's and Bank's doctors
- Montague advised employer of upcoming medical appointments with two other specialists
- Bank terminated her employment and made no inquiries regarding pending medical consultations

Montague v. Bank of Nova Scotia
Trial Judge's Findings

- Bank acted in bad faith
- Montague's summary dismissal by letter in view of pending medical visits to the knowledge of the Bank was unreasonable and argument she abandoned her position "quite preposterous"
- Trial judge awarded 12 months reasonable notice plus 4 months for *Wallace* damages
- No duty to mitigate during notice period given medical condition
- Dismissed claim for aggravated and punitive damages
  - No independent actionable wrong
- $5,000 in costs to Montague

Montague v. Bank of Nova Scotia

- Trial judge's decision upheld by Ontario Court of Appeal
- Leave to appeal to S.C.C. filed by Montague and by Bank of Nova Scotia (March 2 and 8, 2004)

TERMINATING ILL EMPLOYEES
Some Advice

- Consider human rights implications
  - duty to accommodate employees with disabilities to point of undue hardship
- Where decision is to terminate – consider effect on eligibility for disability benefits
- Advisable to continue benefits at a minimum during the statutory notice period
- Treat employees fairly, with awareness of how specific employer actions may impact on individual employees
- Tread carefully around medical information

ARE INDEPENDENT CONTRACTORS ENTITLED TO REASONABLE NOTICE UPON TERMINATION?

Aqwa v. Centennial Home Renovations (Ont. C.A. – 2003)

- Aqwa, independent sales agent
- Centennial terminated the contractor agreement without notice
- Agreement provided either party may terminate the agreement at any time without notice or payment
- Aqwa sued and argued entitled to damages for wrongful dismissal or breach of contract

Aqwa v. Centennial Home Renovations
Trial Judge's Findings

- Judge concluded that Aqwa was an independent contractor but noted the relationship "was closely connected to or akin to an employment relationship"
- Trial judge found termination provision was unreasonable and awarded damages equivalent to 5 times the average monthly commissions and one year's bonus
- Overturned by Court of Appeal

DISMISSING INDEPENDENT CONTRACTORS

- Application of employment law principles to independent contractors
- Distinction between employment relationships and independent contractor
  - Employee
  - Independent contractor
  - Intermediate independent contractor
- Specific notice provisions in the contractor agreement
  - Courts will interpret ambiguity in favour of the independent contractor

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BILL C-45
THE NEW CRIMINAL CODE AT WORK

SYLVIE GUILBERT

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CURRENT DUTIES AND OFFENCES UNDER THE CRIMINAL CODE AND HEALTH AND SAFETY

- List offences
- Prescribes duties
- Contain procedures for prosecution
- “Actus reus” and “mens rea”

KEY NEW AMENDMENTS TO THE CRIMINAL CODE

- The Duty of Care at Work
- Application to “organizations”
- Innocent acts combine to create “actus reus”
- “Mens rea” found in new parties

THE NEW DUTY OF CARE AT WORK

- Everyone who …
  - Undertakes or has the legal authority
  - To direct
  - How another person
  - Does work or performs a task
- The duty of care to take …
  - Reasonable steps to prevent
  - Bodily harm
  - Arising from that work or task

THE ORGANIZATION

- It is now clearly captured in all forms of criminal activity, via the re-definition of the word “organization” and the redefinition of the persons and entities potentially liable under the Criminal Code

REPRESENTATIVES

Definition:

"representative", in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization.

Relevance:

- Provides the "actus reus" of the crime. Actions of the representative, even if innocent or not criminal on their own, in concert with other representatives can be an offence;
- Those actions can be attributed to the organization.

SENIOR OFFICER

Definition:

"senior officer" means a representative who plays an important role in the establishment of the organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.

SENIOR OFFICER

Relevance:

- It is the person who has the “mens rea” to establish a criminal offence, whether it is deliberate direction to another to commit a crime, knowledge of and acquiescence to a crime or responsibility for the workplace duty of care.

SENTENCING FEATURES

- Prison
- $100,000 for organizations on summary conviction
- There is no maximum fine when convicted of an indictable offence

KEY CONCERNS IN REVIEW

- The duty of care extends to anyone doing work – not just employees
- The previously innocent acts of individuals can, in concert, be viewed as criminal
- The “senior officer” is someone who manages part of the operation
  - not a Director or Owner necessarily
- The standard of due diligence must meet the expected standard, or else the “mens rea” of negligence will be proved
- Any employee or agent of the organization is its “representative”
  - Including perhaps outsourced worksites, subcontractors, etc.
- Any group of people acting together can be an “organization”

HUMAN RIGHTS UPDATE

DAVID LAW

April 22, 2004

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Parry Sound v. O.P.S.E.U.
(2003 – S.C.C.)

- Discriminatory discharge grievance of probationary employee is arbitrable despite provision of collective agreement to the contrary
- Unionized employees can file human rights complaints as grievances under the collective agreement whether or not they can point to a specific provision of the collective agreement

O.N.A. v. Mount Sinai Hospital
(Ont. S.C.J. (Div. Ct.) – 2004)

- ESA severance provision which disentitles severely disabled employees from receiving severance pay contravenes the equality rights guarantee in the *Charter*
  - Decision concerns former s. 58(5)(c) of ESA
- Regulation 288/01 of ESA 2000
  - Exemption does not apply where frustration is the result of an illness or injury suffered by an employee, and the *Human Rights Code* prohibits severing the employment

Toronto District School Board and C.U.P.E.

(2003), 120 L.A.C. (4th) 395 (Howe)

- Lifting requirement for part-time school cleaners discriminatory on the basis of sex
- Physical standards must be examined for unintended discriminatory effect
- Physical standards must be necessary to perform the job
- Onus on employer to justify the standard or policy
  - 3-step *Meiorin* approach
- Employers must build accommodation into work rules and standards rather than supplementing discriminatory standards by accommodating those who cannot meet them

Parisien v. OC Transpo (CHRT - 2003)
Desormeaux v. OC Transpo (CHRT- 2003)

- Arbitrator's dismissal of grievances regarding terminations for innocent absenteeism does not bar successful human rights complaints and reinstatement of complainants
- Employer may be required to tolerate excessive absenteeism as a means of accommodation
  - Judicial Review – Federal Court (Trial Division), heard April 21, 2004

Canadian National Railway and B.L.E.

(2003) 118 L.A.C. (4th) 228 (M.G. Picher)

- Employer is not required to create a position that is not productive, regardless of its size or revenues
  - Duty to accommodate does not require an employer to endure hardship of unproductive work
- Employee's duty to co-operate
- Employee cannot expect a perfect solution
  - Duty to accommodate is not a perfect instrument of make whole protection
- Employer is not the insurer of all aspects of grievor's economic and family life

Toronto Transit Commission and A.T.U.
(2003 – Chapman)

- Mental distress damages awarded for failure of large employer to take into account its human rights obligations in the administration of its attendance management policy
  - $2,500 loss of dignity and self-respect
  - $2,500 mental anguish

Toronto Transit Commission and A.T.U.
(2003 – Springate)

- Wide variety of relatively short-term medical conditions found not to constitute a disability
- Disability
  - Interpreted broadly
  - Duration (temporary, permanent)
  - Level of impairment
  - Real or perceived

Prologix Distribution and Teamsters
(2003 – Kaplan)

- Grievor returned to work from absence due to stress and anxiety seeking transfer due to a fear of driving a van
- IME and grievor's own physician confirmed absence of a disability
- No disability - no obligation to accommodate

Domtar Inc. and I.W.A.W.C.

(2003 – Tims)

- Employee who suffers from a disability will not be excused for workplace misconduct where no casual connection exists between the medical condition and the misconduct

LEGISLATIVE UPDATE – WHAT IS ON THE HORIZON?

TRISHA GAIN

April 22, 2004

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LEGISLATIVE UPDATE

- Compassionate care leave
  - Bill 56 - *Employment Standards Amendment Act (Family Medical Leave), 2004*
  - First reading April 13, 2004
- Hours of work – ending the 60 hour work week
  - Discussion paper (input by February 27, 2004)
  - www.gov.on.ca/lab
- Elimination of mandatory retirement
  - Ontario government committed to ending mandatory retirement

FAMILY MEDICAL LEAVE
Basic Entitlement

- Up to 8 weeks of job-protected leave
- Requires a supporting medical certificate of a qualified medical practitioner confirming that a family member has a serious medical condition with a significant risk of death within 26 weeks
- Employee is entitled to another 8 weeks of job-protected leave if the family member is still gravely ill at the end of the 26-week period
  - Provided a second medical certificate is obtained

FAMILY MEDICAL LEAVE
"Family Member"

- An employee's spouse
- A child of the employee
- A child of the employee's spouse
- A parent of the employee
- Child and parent includes persons in "step" or "foster" relationships
- Any individual prescribed as a family member

FAMILY MEDICAL LEAVE

- 8 weeks leave to be shared if two or more employees want to take leave to care for the same family member
- Applies to all employees covered under the ESA, 2000, including part-time employees
- Amends definition of “spouse” in several provisions to include same-sex couples whether they are in a married or common-law relationship
  - Reflects Ontario C.A. June 2003 ruling in *Halpern v. Canada (A.G.)* which allowed same-sex couples to marry

FAMILY MEDICAL LEAVE

- Employee required take leave in periods of entire weeks
- Employee required to advise employer in writing
- Allows employee to take leave before advising the employer – employee must advise employer in writing as soon as possible after beginning leave
- Leave is in addition to any entitlement to emergency leave under section 50
  - 10 days unpaid, 50 or more employees

FAMILY MEDICAL LEAVE
Rights During Leave and Reinstatement Obligations

- Same rights and reinstatement obligations as pregnancy, parental and emergency leave
- Reinstatement to same position where it still exists or to a comparable position

Natrel Inc. and Teamsters
(2004 – Swan)

- Use of emergency leave as the factor which pushes an employee over a threshold and into an attendance management program or maintains the employee in the program constitutes a reprisal under section 74 of the *Employment Standards Act, 2000*
- "An employee ought not to be dissuaded, even by non-disciplinary pressures, to forego a statutory right to emergency leave."

ENDING THE 60-HOUR WORK WEEK

- Before ESA 2000 – 48-hour work week
- Excess hours – permit required from the Ministry
  - "Gold" or "Extended Work Day"
  - "Blue" or "100-hour"
  - "Green" or "special"
  - Industry permits
- ESA 2000 ended the permit system
  - 60-hours where employer and employee agree
- Discussion Paper (released January 2004)
- Former permit system - complex and difficult to understand
- Current system – not enough protection for employees

ENDING THE 60-HOUR WORK WEEK
Two Alternative Models

Under both models:

- Government would introduce a new permit system
- Requires employers to obtain written agreements from employees affected
- Agreements could be revoked by employees by giving 2 weeks' notice or by employer on reasonable notice
- Unionized workplaces, union could agree to longer working hours on behalf of individual employees
- Employer has the right to ask the Ministry of Labour to vary the permit to allow for more hours
- Ministry to spot check agreements to determine whether they were signed by employees voluntarily

PERMIT SYSTEM
Proposed Models

- 1st MODEL
  - Standard block permits for up to 120, 240 or 360 extra hours in a given calendar year
  - Special industry permits for certain industries requiring more than 360 extra hours in a year
  - Certain industries by regulation could have more than 48 hours in a work week before a permit is needed
- 2nd MODEL
  - Customized permits based on employer/employee agreement
  - Certain industries by regulation could have more than 48 hours in a work week before a permit is needed
  - Special industry permits to allow for more hours of work in a week after 48

MANDATORY RETIREMENT

- Re-defining “age” in the Ontario *Human Rights Code*
- Currently “age” for the purpose of discrimination in employment is defined as more than 18 years and less than 65 years
- This has allowed employers to require that employees retire at age 65 without running afoul of the Code
- *Policy on Discrimination Against Older Persons Because of Age* – OHRC Policy (June 2002)

MANDATORY RETIREMENT

- Former Conservative government introduced Bill 68 (*Mandatory Retirement Elimination Act*) in May 2003
  - Not passed prior to election
- Liberal government has indicated its intention to introduce legislation
  - No timetable provided

BANNING MANDATORY RETIREMENT
The Practical Implications

- No longer able to implement policies that require automatic retirement at a particular age
- Some occupations – bona fide occupational requirement (BFOR)
  - duty to accommodate without incurring undue hardship
- Increased request for age-related accommodation
- Increased need for performance monitoring

BANNING MANDATORY RETIREMENT
The Practical Implications

- Revisions to age-based provisions in benefit plans
  - LTD, life insurance, prescription drug benefits
- Increased benefit costs
- Termination costs - reasonable notice entitlement
- Revisiting collective agreement provisions
- Consider implementing early retirement incentives
  - voluntary exit programs