

**BREAKFAST FOR
BUSINESS**
Employment Law Update
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Dan Condon

Sonja Williams

WILSON VUKELICH LLP



Legislative Changes

Human Rights

- Ontario's new human rights system was launched on June 30, 2008
- this will impact both complaints issued after June 30, 2008, as well as those issued previously but had yet to be concluded

Existing Complaints

- between June 30, 2008 and December 31, 2008 complainants can withdraw their complaint with the Human Rights Commission and instead take part in the Ontario Human Rights Tribunal's “expedited process”
- conversely, a complainant can continue their complaint with the Commission until January 1, 2009, and if it hasn't been determined by that time they can then file an application with the Tribunal

Expedited Process

- this was devised for "simple" complaints which do not involve a significant number of witnesses or volume of evidence and does not involve systemic issues and possible "public interest remedies"
- under the expedited process a mandatory mediation takes place followed by a case resolution conference

- a case resolution conference generally takes 1 – 2 days and is informal
- the adjudicator assigned to the conference can question parties or witnesses, express his or her own views, or ask for further evidence
- at the end of the case resolution conference the adjudicator makes a decision whether there is discrimination and what remedy to order

Tribunal Hearing

- these are for cases which are seen as being more complicated and involving extensive evidence
- mediation is available but not mandatory and a full Tribunal hearing is held

Civil Claims

- of course, terminated employees are now able to combine a human rights complaint with a claim for wrongful dismissal with the civil courts
- Judges have the jurisdiction to award human rights remedies including reinstatement and damages for breach of human rights in addition to pay in lieu of notice

Overtime Pay Update

- a settlement was recently reached in the overtime class action lawsuit against KPMG which is expected to cost KPMG as much as \$10 million dollars
- currently three other Canadian employers are at risk of having to pay more than \$1 billion in overtime pay as a result of three separate class action lawsuits

Overtime Pay

- subject to limited exceptions, overtime applies to all non-managerial employees whether they are casual, temporary, part-time, students or even contract workers who work in excess of 44 hours per week in Ontario

How to Avoid Liability for Unpaid Overtime

- properly monitor and keep accurate records of hours worked (regular and overtime) and wages paid to employees
- create a defined pre-approval process for overtime
- suggest overtime averaging agreements where employees agree to average weekly hours of work over several weeks

Restrictive Covenant Update

- on a regular basis Courts review and decide whether to enforce restrictive covenants
- previously, the Ontario Court of Appeal held that non-solicitation covenants are to be preferred to non-competition covenants
- a recent Court of Appeal decision seems to take this preference even further

- in an August 2008 decision, the Court of Appeal overturned a Trial Judge's decision enforcing a non-competition covenant on the basis that it had an indefinite geographic scope and that the prohibition was overreaching in that it prohibited the employer from doing all work with the company's clients

- the Court of Appeal also went on to state, however, “a non-solicitation clause is sufficient in a conventional employer/employee situation”

Impact

- this would appear to further limit an employer's ability to force non-competition covenants
- accordingly, it is paramount that employment agreements include well thought out non-solicitation and confidentiality covenants

Amending Employment Contracts

- an employer can no longer make significant changes to a term or condition of employment by just providing reasonable notice of the change to affected employees
- three options are available to an employee when an employer attempts a unilateral amendment to a fundamental term of a contract of employment

Amending Employment Contracts

1. the employee may accept the change in the terms of employment in which case the employment will continue under the altered terms
2. the employee may reject the change and sue for constructive dismissal
3. the employee may make it clear to the employer that he or she is rejecting the new term, but continue to work

How to Avoid the Risk of Liability for Constructive Dismissal

1. provide employees with “reasonable” written notice that employment under the current terms and conditions is ending effective on a certain date
2. offer re-employment on new terms beginning on the effective date of the changes
3. if employees refuse to agree to take employment on the new terms, terminate their employment effective the date given in the notice

Near Cause

- terminations in Canada take place on a with or without cause basis
- if cause exists the employee is not entitled to receive notice or pay in lieu of notice of termination
- just cause is difficult to establish
- Previously, there was a middle road with respect to terminations
- this was "near cause"

- near cause allowed Courts to acknowledge that although an employer did not have a sufficient basis to terminate on a just cause basis the employee's misconduct had contributed to the dismissal
- the result of this was to allow a Court to reduce the notice period to be awarded

- in 1997, the Ontario Court of Appeal eliminated the possibility in Ontario. The Supreme Court of Canada did so for the balance of the country in 1998
- recently, an Ontario Trial Judge re-examined the concept of near cause
- while the Judge did not make a finding of near cause, he did suggest that near cause is consistent with employment law principles and may in fact help to encourage settlements

Impact

- the fact cause remains an all or nothing scenario reinforces the need to properly document, discipline, and monitor employees
- it also continues to reinforce the benefits of having employment agreements which, from the outset, address the rights employees are entitled to in the event of the ultimate termination of the employment relationship

Duty to Mitigate

- When an employee is terminated, they have a duty to attempt to mitigate their damages by finding reasonable alternate employment
- the Supreme Court of Canada recently released a decision which examined an employee's duty to mitigate

Duty to Mitigate

- in this instance, an employee had been terminated and had received salary continuance for a period of months
- when the former employer and employee were unable to negotiate a settlement with respect to the wrongful dismissal claim, the employer required the employee to return to work in the previous position for the balance of the notice period

Duty to Mitigate

- based on the facts of the case, the Supreme Court of Canada held that the employee was required to do so in order to mitigate his damages
- while each case is dependent upon its facts, the decision suggests that in appropriate instances employees will be required to work out the notice period notwithstanding the fact that there has been a previous termination of employment
- The Supreme Court of Canada also held that **Wallace** damages were not subject to mitigation

Impact of the Keays v. Honda Decision

- The decision clarifies for employers the potential damage exposure for terminations that constitute wrongful dismissals and employer rights with respect to disability management
- Wallace damages are only available where the employee “can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties” and that Wallace damages “will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages”

Impact of the Keays v. Honda Decision

- a disability program which involves regular contact with an employee's physician in order to support treatment is a legitimate form of accommodation

QUESTIONS?

If you have any questions or require additional information feel free to contact:

Dan Condon

Wilson Vukelich LLP

905-940-5505

dcondon@wilsonvukelich.com

Sonja Williams

Wilson Vukelich LLP

905-940-0526

swilliams@wilsonvukelich.com