

# Recent Developments in Employment Law:

*An Overview of the Implications for your Agency*

Changing Tides – 2017 OARTY Conference

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# Overview

- Case law developments
  - Highlighting the importance of employment contracts
- Legislative developments
  - *Occupational Health & Safety Act*
  - *Accessibility for Ontarians with Disabilities Act, 2005*
  - *Human Rights Code*
- Upcoming changes
  - Bill 148

# I. Case Law Developments

# Employees & Contractors

- Implied Relationships:
  - Employee
  - Independent Contractor
  - Dependent Contractor
    - An intermediate position between employee status and independent contractor

# Employees & Contractors

- *Keenan v. Canac Kitchens Ltd.* (2016, ONCA)
  - Married couple working for Canac
  - Years of service - 32 (husband) and 25 (wife)
  - Age - 63 (husband) and 61 (wife)
  - Worked as employees and then called “independent contractors”
- Court found that Keenans were economically dependent on Canac (high level of exclusivity)
- Entitled to 26 months’ pay in lieu of notice

# Termination Rights

- *Employment Standards Act* (“ESA”)
  - Notice of termination or termination pay
    - After 3 months, 1 week’s notice or pay per year, up to 8 weeks
  - Severance pay
    - 5 years or more of service and \$2.5 million annual payroll
      - 1 week’s pay per year to 26 weeks, in a lump sum
  - Statutory minimums only
    - Apply to employees

# Termination Rights

- Implied common law entitlements
  - Applicable where no enforceable agreement governs termination entitlements
  - “Reasonable” notice of termination
    - Applies to employees and dependent contractors
  - Consider age, length of service, position (among other factors)
  - “Rule of thumb” - 1 month per year of service
    - Minimum 3 months, maximum 24 months (or more)
  - Exception is just cause

# Contractual Termination Clauses

- Employers can contract out of the common law but not the ESA
- Termination clauses in employment contracts (and contractor agreements) can limit an employee's (or contractor's) entitlements upon termination
- Termination clauses must be carefully drafted to avoid invalidity
  - Not less than ESA minimums
    - Including benefits entitlement
  - Future compliance with ESA



# Contractual Termination Clauses

- *Oudin v. Centre Francophone de Toronto* (2016, ONCA)
  - Parties signed an employment contract with a termination clause
  - Termination clause provided that employer could terminate employment with ESA minimum notice
    - No mention of severance pay
  - Employee argued that employer had contracted out of ESA and therefore, clause invalid
  - Court of Appeal agreed with trial judge – parties' intent was to respect ESA

# Fixed-Term Contracts

- Intent is that relationship to last for only a specific and definite length of time or until a specific project is completed
- Once term or project is finished, the relationship ends
  - No entitlement to notice or pay-in-lieu
- Important for fixed-term contracts to include a provision for earlier termination by the employer

# Fixed-Term Contracts

- *Howard v. Benson Group Inc.* (2016, ONCA)
  - Parties had a written employment contract for a 5-year term
  - Contract did not provide for earlier termination by the parties
  - Employee terminated after 23 months without cause
  - Court held that employee was entitled to salary and benefits for the unexpired term of the contract (i.e. over 3 years)

# Restrictive Covenants

- Implied obligations during employment/services
  - Duty to work and follow lawful instructions
  - Duty of fidelity (honesty)
    - No competition or conflict of interest
    - No misuse of confidential information
    - No misappropriation of employer's property

# Restrictive Covenants

- After employment/services end
  - Restrictive covenants are not implied
  - Employees and contractors free to “compete” immediately, using skills, knowledge and personal good will
  - Employees and contractors free to “solicit” your clients and employees
- Unless fiduciaries or written agreement

# Restrictive Covenants

- Covenants to be included in employment contracts:
  - Confidentiality clause (e.g. client lists, fees, and marketing strategies, etc.)
  - Intellectual property clause
  - Non-solicitation covenant
    - Employees
    - Clients
    - Referral sources and suppliers

# Restrictive Covenants

- *Computer Enhancement v. J.C. Options, et al.* (2016, ONSC)
  - Employment contract contained a non-competition clause
  - Employee restricted from working for a competitor in any province where the employer carried on business for a period of 6 months
  - Non-competition clauses in employment contracts are void as a general rule
    - Enforced only in exceptional circumstances
  - In this case, clause was overly broad and unenforceable
  - Non-solicitation clause sufficient to protect legitimate business interests

# Termination for Just Cause

- Employees not entitled to notice where there is cause to terminate their employment
  - Serious misconduct
  - Habitual neglect of duty
  - Wilful disobedience
  - Incompetence
- High threshold for employers to prove cause
  - ESA standard for cause is higher
    - Wilful misconduct, disobedience, wilful neglect of duty that is not trivial



# Termination for Just Cause

- *Gordon v. Altus* (2015, ONSC)
  - Employee terminated for cause
  - Employer accused employee of insubordination, conflict of interest
    - Allegations unfounded
  - Court awarded \$100,000 in punitive damages due to employer's harsh treatment of employee

# Importance of the Employment Contract

- Assist in defining relationship as employee or contractor
- Limit potential liability on termination of employment
- Allow for inclusion of reasonable restrictive covenants
  - Non-solicitation, confidentiality, intellectual property, etc.
- Reduce risk of fixed-term contracts
- Avoid necessity to terminate for cause

## II. Legislative Developments

# *Occupational Health & Safety Act*

- Requires employers to investigate and respond to complaints of workplace violence and harassment (including sexual harassment) involving a worker
  - Need not be tied to a prohibited ground of discrimination (e.g. bullying)

# *Occupational Health & Safety Act*

- Bill 168 (June 2010)
  - Protections against workplace violence and harassment
  - Required policies and a workplace violence program
    - Investigate complaints of violence and harassment
- Bill 132 (September 2016)
  - New obligations for employers regarding workplace harassment (including sexual harassment)
  - Duty to investigate all incidents/complaints of harassment
  - Investigation must be “appropriate in the circumstances”
  - MOL can mandate employers to hire an external investigator at the employer’s expense

# Code of Practice

- Employer must investigate incidents and complaints
  - Formal complaint (verbal or written)
  - Otherwise aware of incident
- Appropriate and objective investigation
  - Investigator must have knowledge of how to conduct an appropriate investigation

# Code of Practice

- Investigation must be completed within 90 calendar days or less, unless there are extenuating circumstances
- Seven investigative steps must be completed:
  1. Investigation must be kept confidential and identifying information is not disclosed unless necessary to conduct investigation or required by law – remind parties and witnesses of confidentiality requirements
  2. Thoroughly interview alleged worker being harassed and alleged harasser

# Code of Practice

3. Alleged harasser must be given the opportunity to respond to specific allegations, and the worker allegedly harassed is given an opportunity to reply
4. Separately interview any relevant witnesses
5. Collect and review any relevant documents (e.g. e-mails, texts, recordings, etc.)
6. Take appropriate notes and statements during interviews with the parties and witnesses



# Code of Practice

7. Prepare a written report containing:
  - Steps taken during investigation
  - Complaint
  - Allegations
  - Alleged harasser's response
  - Evidence of witnesses and other evidence gathered
  - Findings of fact
  - Conclusion

# Code of Practice

- Investigative report must be provided to the employer, supervisor or designated person to take appropriate action
- Results of investigation and any corrective action must be communicated in writing to the worker allegedly harassed and the alleged harasser within 10 calendar days of the completion of the investigation
  - Outline steps employer has taken or will take to prevent a similar incident

# Kinark Child and Family Services (2016)

- Agency providing children's mental health services and support
- Incident of workplace violence by youth resident against two workers
- Workers suffered physical and psychological injuries
- Agency pleaded guilty to failing to provide information, instruction and supervision to protect a worker from violence
- Fined \$125,000

# *Accessibility for Ontarians with Disabilities Act*

- Purpose is to achieve accessibility for Ontarians with disabilities through accessibility standards in various areas, including:
  - Goods and services
  - Communications
  - **Employment**
  - Transportation
  - Design of Public Spaces

# AODA – Employment Standards

- Apply to organizations that are employers
- Apply in respect of employees
- Do not apply in respect of volunteers and other non-paid individuals
- Compliance:
  - Large organizations (50 or more employees) – January 1, 2016
  - Small organizations (less than 50 employees) – January 1, 2017

# AODA – Employment Standards

## Hiring:

- Notify employees, the public and applicants selected to participate in an assessment or selection process of the availability of accommodation for disability
- Where an applicant requests an accommodation, employers must provide suitable accommodation (in consultation with applicant)
- When making offers of employment, employers have to notify successful applicants of their policies for accommodating employees with disabilities

# AODA – Employment Standards

## Support Policies

- Inform all employees of the policies used to support employees with disabilities
  - Including policies on the provision of job accommodation
- Inform when employees begin their employment and whenever there is a change to the policies

# AODA – Employment Standards

## Communication Supports

- Where requested by an employee with a disability, provide or arrange for the provision of accessible formats and communication supports for information:
  - Needed to perform the employee's job
  - Generally available to employees in the workplace



# AODA – Employment Standards

## Accommodation Plans (Large Employer)

- Required to develop and have in place a written process for the development of documented individual accommodation plans for employees with disabilities
  - How employee, union or other workplace representative can participate in development of plan
  - Means by which employee will be assessed
  - Employer requests for outside medical or other expert assistance
  - Steps to protect employee privacy
  - When and how the plan will be reviewed and updated
  - Reasons for denying an accommodation plan
  - Means for providing the plan in an accessible format

# AODA – Employment Standards

## Return to Work (Large Employers)

- Must develop and have in place a return to work process for employees who have been absent from work due to disability and who require disability-related accommodations in order to return to work
- Return to work process must be documented and must outline the steps the employer will take to facilitate the return to work of employees
- Must use documented individual accommodation plans as part of the process

# AODA – Employment Standards

- Performance Management (e.g. activities related to assessing and improving performance)
- Career Development and Advancement (e.g. additional responsibilities, promotions)
- Redeployment (e.g. reassignment to other departments and jobs)
- Must take into account disability needs and accommodation plans of employees with disabilities

# *Human Rights Code*

- Every person has the right to equal treatment with respect to employment without discrimination → 16 prohibited grounds
  - Gender identity (an individual's sense of being a man, woman, both, neither)
  - Gender expression (how a person publically presents their gender e.g. clothes, make-up)

# *Human Rights Code*

- Commission has developed a new policy to protect rights of trans people
- Everyone has the right to define their own gender identity and to be recognized and treated as that gender without discrimination or harassment
- Whether or not they have undergone surgery or have their identity documents up-to-date

# *Human Rights Code*

- Employers must have a valid reason for collecting personal information that identifies gender
- Information collected must be kept confidential
- Trans people can have their name and sex designation changed on employment records
- Trans people should have access to washrooms, change rooms and other gender-specific services and facilities based on their lived gender identity

# *Human Rights Code*

- Dress code policies should be inclusive and flexible
  - Cannot prevent dressing according to expressed gender
- Employers must design or change their rules, practices and facilities to avoid negative effects on trans people
- Trans people must be provided with any needed accommodation unless it would cause undue hardship

# III. Bill 148



# Bill 148

- *Fair Workplaces, Better Jobs Act, 2017*
- Proposed provincial legislation
- Passed first reading on June 1, 2017
- Contains many proposed changes to:
  - *Employment Standards Act, 2000*
  - *Labour Relations Act, 1995*

# Minimum Wage Increases

- Increasing the general minimum wage from \$11.40 per hour to:
  - \$14 per hour on January 1, 2018
  - \$15 per hour on January 1, 2019

# Equal Pay for Equal Work

- Part-time, temporary employees and agency workers must be paid equally to full-time employees when performing the same job for the same employer
- These employees would be able to request a review of their wages and the employer would have to respond to the request by adjusting pay or providing a written explanation for the wage difference
- Pay systems that differentiate on the basis of seniority, merit, or quantity and/or quality of production would be exempt

# Scheduling

- An employee would have the right to request a schedule or location change after being employed for 3 months
  - Grant or provide reasons for denial
- Employees could refuse to accept shifts without penalty if asked to work with less than 4 days' notice
- An employee who works for more than 3 hours per day, but is given less than 3 hours' work upon reporting to work, must be paid 3 hours at his/her regular rate of pay
  - Exceptions such as power failure, storms, fire, etc.

# Scheduling

- If a shift is cancelled within 48 hours of its start, employees must be paid 3 hours at their regular rate of pay
- When employees are “on-call” and subsequently do not get called into work, they must be paid three hours at their regular rate of pay

# Paid Vacation

- The 2 week vacation entitlement would increase to 3 weeks after 5 years' service

# Personal Emergency Leave

- All employees would be entitled to 10 personal emergency leave days per year, 2 of which are paid
- Employers would be prohibited from requesting a sick note from an employee taking a personal emergency leave
  - Entitled to evidence reasonable in the circumstances

# Employee Misclassification

- Employers will have to prove that independent contractors are properly classified
- Employers who misclassify employees as independent contractors would be subject to harsher penalties (including prosecution, public disclosure of a conviction and monetary penalties)



# Union Certification

- Unions would be able to more easily be certified without a vote when an employer engages in conduct that contravenes the LRA
- Employee contact information would have to be disclosed to a union by the employer if the union can demonstrate 20% membership support

# Structure of Bargaining Units

- Unions would be able to apply to the OLRB for an order consolidating or changing the structure of bargaining units within a single employer where the existing bargaining units are no longer appropriate for collective bargaining

# Just Cause Protection

- Employees would be afforded protection from discipline or discharge without just cause by their employer
  - In the period between certification and conclusion of a first contract
  - During the period between the date the employees are in a legal strike or lock-out position and the new collective agreement



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