employmentlawtoday.com
Dec 21, 2016

Arbitrator finds employer violated OHSA workplace-violence obligations

Employer didn't do enough to keep client who made threats away from employee
By Adrian Miedema

A labour arbitrator has found that a mental health organization violated the Occupational Health and Safety Act (OHSA) when it failed to take certain workplace-violence precautions.

The organization provided services to persons with mental health issues, including securing housing.

A Case Manager with the organization became aware that a client had sent another client a text suggesting that he wanted to sexually assault the employee. The organization decided to bar the client from contact with the employee and from attending drop-in sessions. Nevertheless the client attended drop-in sessions on at least two subsequent occasions.

The arbitrator found that the organization did not have any means of preventing a client from texting another client an offensive text that threatened an employee. However, the organization, having barred the client, failed to ensure that the client "heeded the injunction" and stayed away. That was a violation of the OHSA. There was no evidence that the employee encountered the client at any of the drop-ins after he was barred, so there was no basis for an award of damages.

In a second incident, the employee reported that she felt threatened by a client. The employee's notes included references to the client "'leaning over writer', 'shouting about aliens', invading her personal space 'as he kept tapping her on the knee', becoming 'extremely agitated', leaning over the Grievor, speaking about eating humans and making 'a sudden strangling gesture towards [the Grievor]', referring to having been on probation in connection with charges of sexual assault of a woman, 'leaning over [the Grievor] in an aggressive manner and she had to push him back away from her', being told by the Grievor that his behaviour was threatening and that he does not respect her personal space, 'advancing towards [the Grievor] on a couple of occasions screaming about aliens, homosexuals and radiation, invading the Grievor's personal space, and, finally, charging the Grievor, pushing her forcefully in the chest, and causing her to lose her balance.'

The organization directed the employee to stay out of that client's residence based on her perception of a threat, but she ignored that direction. The arbitrator decided that the organization had violated the OHSA by failing to ensure that the employee complied with the employer's direction. Again, no damages were warranted, but the arbitrator granted a "declaration" that the employer had breached the OHSA.

For more information see:

- *Cota Health and OPSEU, Local 548 (Kostadinova), Re*, 2016 CarswellOnt 18642 (Ont. Arb.).

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para. 95(2)(f.1) if party B owned less than 10% of NRC.

Cross-border surplus stripping

The third point concerns an October 21 proposal (see: Notice of Ways and Means Motion (Budget Implementation Act, 2016, No 2)) ("NWMM") to expand the reach of a rule intended to prevent "surplus stripping" of Canadian companies by foreign shareholders.

Those are arrangements by which a foreign shareholder seeks to avoid paying the Canadian tax of 25% (usually significantly reduced by the terms of an income tax treaty, of which Canada has nearly 100) applicable to dividends paid by Canadian corporations to foreign shareholders.

For example, a non-resident may sell the shares of a Canadian company to a newly formed Canadian holding company that pays for them with property it extracts from the purchased company. Certain rules of the Act (see s. 112 respecting intercompany dividends and s. 115 respecting the sale of shares that are not TCP, as outlined above) seek to render such transactions tax-free.

But, such arrangements were countered as far back as in the 1970's when s. 212.1 was added to the Act. That section makes the Part XIII dividend tax applicable to the portion of any non-share payment by the new Canadian holding company to the foreign shareholder that exceeds the "paid up capital" of the shares sold to the Holdco.

Exception

There was, however, an important exception to s. 212.1 (contained in s. 212.1(4)) that facilitated acquisitions of Canadian companies owned by foreign companies. That exception allowed a third party to establish a Canadian holding company to make the acquisition (of the foreign holding company) and then unwind the structure.

Limitation

But, in a reaction to certain recent corporate reorganizations related to acquisitions, the October 21 NWMM proposes to effectively limit the subs. (4) exclusion to acquisitions involving Canadian residents.

Such limitation was heavily criticized in a July 25 submission to the government by the Joint Committee on Taxation of the CBA and of CPAs of Canada. It also harbours potentially arbitrary results arising from the fact that the exemption will not be available if a Canadian holding company formed to acquire the target has a single non-resident shareholder that deals at non-arms length with the Holdco, no matter how small the interest.

REFERENCES: *R. v. Black & Decker Manufacturing Co.*, 1974 CarswellOnt 258, 1974 CarswellOnt 259, [1975] 1 S.C.R. 411 (S.C.C.); *Univar Holdco Canada ULC v. R.*, 2016 TCC 159, 2016 CarswellNat 2472 (T.C.C. [General Procedure])); Nathan Boidman, "Judicial and Legislative Developments Threaten Indirect Canadian Acquisitions," *Tax Notes International* (October 10, 2016) p. 163.

EMPLOYMENT LAW

Employer must protect employees from harassing tweets

Andy Pushalik,
Dentons Canada LLP

An arbitrator has ruled that an employer must protect its employees from harassing tweets made by the general public through the employer's social media account.

The Toronto Transit Commission (the "TTC") operates two Twitter accounts: @TTCnotices, which account is used to provide service updates, reminders and information about service issues; and @TTChelps, which account is used to receive and respond to customer service questions and concerns.

Union grievance

In *Toronto Transit Commission and ATU, Local 113 (Use of Social Media), Re*, the union grieved the TTC's use of @TTChelps, alleging that the TTC's use of this particular social media account had resulted in a breach of its workers' privacy rights as well as its obligation to provide workers with a workplace free of harassment.

Over the course of a 12-day hearing, the union introduced a number of tweets from angry customers that were directed at TTC workers and laced with profanity and discriminatory comments. In some instances, the customers' tweets threatened violence.

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TTC response

The TTC generally responded to these tweets by ignoring the offensive language and directing the customer to the complaints procedure, or by cautioning the customer from making personal attacks against its workers while simultaneously acknowledging the customer's frustration.

Parties' positions

The union also relied on a number of tweets in which a customer had taken a photo of a worker and posted it to the TTC's twitter account. Such photo was usually accompanied by a derogatory statement about the worker's appearance, or a request that the TTC discipline the worker for poor performance.

In several cases, the TTC asked the customer for more information about the incident, including the bus and route number and time of day when the incident occurred. In the union's view, the TTC was circumventing the complaint process which process had been negotiated through collective bargaining and was enshrined in the collective agreement.

In response, the TTC argued that, in this day and age, customers expected to be able to interact with companies and service providers through social media. According to the TTC, to accept the union's position would lead to the conclusion that

> no employer or government service provider can use social media as a means of communication with either the public or its customers because of the potential for concerns.

Arbitrator's decision

After reviewing all the evidence, the arbitrator agreed with the union that the TTC had not done enough to protect its workers from harassment, nor had it sufficiently protected its workers' privacy rights. Employers are liable not only for their own acts of discrimination and harassment in the workplace, but also for the acts of third parties, such as customers.

In this case, the arbitrator held that social media sites operated by the TTC constituted part of the workplace for the purposes of the applicable human rights legislation and also with respect to the employer's workplace violence and workplace harassment policies.

Ultimately, while the TTC may not be able to control everything that is posted through its twitter or other social media accounts, it does have control over how it responds to the discriminatory and harassing comments made by users, and the steps it can take to stamp out this type of conduct.

Lessons for employers

The arbitrator did not grant the union's request to shut down @TTChelps; however, he did provide some practical tips that can be used by employers in all workplaces to minimize the risk of a breach of employees' privacy rights and deter third parties from posting harassing or discriminatory comments about employees on company-sponsored social media accounts:

1. **Template Responses to Abusive Tweets and Other Online Messages:** Employers should prepare template responses that can be quickly posted to their social media accounts which responses deter people from making abusive or derogatory comments. In addition to stating that the employer does not condone these types of offensive messages, the responding statement should also request that the third party immediately delete the offensive message, failing which the third party will be blocked from making any further comments to the employer's social media account.
2. **No Photos Please:** Employers should advise the public that it does not condone the posting of photos of its employees. Where users do post photos of employees, the employer should immediately contact the user and request the post be deleted. If the photo is not taken down, the user should be blocked from the site.
3. **Social Media Policy:** While the Arbitrator acknowledged that parts of the TTC's other policies could be applied to address the offensive tweets received through @TTChelps, he nonetheless recommended that the TTC create a social media policy which consolidated and refined these various policy statements. Accordingly, where an employer has a robust online presence that encourages the use of social media, it is a good idea to create a standalone policy which sets out the company's expectations.

Social media (and, in particular, Twitter) has become a critical way for service providers and other organizations to interact with the public. However, while such new media represent a powerful way for organizations to enhance their relationship with their customers, companies must exercise caution to ensure that they maintain a positive working environment for their employees.

REFERENCES: *Toronto Transit Commission and ATU, Local 113 (Use of Social Media), Re*, 2016 CarswellOnt 10550 (Ont. Arb.).

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Feb 9, 2017

Court refuses small-town mayor’s OHSA-based request for injunction prohibiting resident from harassing her

Harassment provisions not intended to apply to someone outside the workplace: Court
By Adrian Miedema

An Ontario judge has rebuffed a small-town mayor’s attempt to use the Occupational Health and Safety Act‘s (OHSA) violence and harassment provisions to obtain a court order stopping a town resident from harassing her.

The mayor claimed that the resident had engaged in workplace harassment and violence, contrary to the OHSA, by sending her numerous "increasingly abrasive" letters and emails in which he made pejorative statements about the mayor and made comments about the “unprofessional conduct” of the town. The resident was apparently “interested in horticulture and town beautification” and had concerns about the management of the town’s affairs.

The court decided that the evidence did not support a finding that workplace violence had occurred. There was just one allegation that the resident had verbally harassed the mayor during an encounter at the town health unit, where the mayor held a full-time job, in 2014. Also, the judge stated that it was doubtful that the harassment policy or the OHSA’s harassment provisions were ever intended to apply to persons who are not part of the “workplace”. The judge decided that in this case, the resident was not a coworker, so the harassment policy did not apply to his actions.

The mayor and the town were therefore not entitled to an “injunction” order from the court prohibiting the resident from communicating with, harassing or publishing any information about the mayor or any other town councillor or employee.

For more information see:

• *Rainy River (Town) v. Olsen*, 2016 CarswellOnt 21052 (Ont. S.C.J.).

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this changes such that the underlying analysis and background information is included in the fairness opinion or proxy circular in the future, as is the case in the United States.

Opinions and expert evidence

The board in this case was criticized for not obtaining a second independent flat fee fairness opinion. Although such opinions are sometimes obtained, doing so is not a common practice in Canada.

InterOil did not introduce any evidence to contradict Mulacek's experts. This was probably because InterOil was under pressure to complete the deal. In future, target companies will have to consider the risk of not taking the time to introduce their own expert evidence.

Conflicts of interest

The court of appeal was critical of the CEO and management's role in the negotiations. Target companies must carefully consider and manage these conflicts of interest. Management may have a financial incentive to have the deal completed. Traditionally, the concern has been that members of management would oppose the deal to entrench themselves.

While an arrangement is a popular structure for M&A transactions, such a structure always involves the risk that a disgruntled shareholder will use the court hearing as a platform to oppose the transaction. In future, target companies may give more consideration to proceeding by take-over bid or amalgamation.

REFERENCES: *InterOil Corp. v. Mulacek*, 2016 YKCA 13, 2016 CarswellYukon 126 (Y.T. C.A.).

EMPLOYMENT LAW

Employers beware: damage awards are on the rise

Andy Pushalik,
Dentons Canada LLP

Employers who fail to discharge their duty of good faith in their dealings with their employees run the risk of attracting a hefty damage award.

Employers will tell you that employment litigation is on the rise. So are damages. It used to be that awards of punitive and aggravated damages were the exception to the rule. While still rare, judges seem to be becoming more comfortable in making these types of awards.

As a result, employers need to be careful when dismissing employees to ensure that their actions will not be seen as a breach of their duty of good faith and, consequently, attract a hefty damage award in favour of the employee.

Types of damages

Generally speaking, wrongful dismissal litigation includes three primary forms of damages: damages in lieu of reasonable notice, aggravated damages, and punitive damages.

The first type of damages is well known to employers. Absent an employment contract with an enforceable termination provision, Canadian employers operating in common-law jurisdictions have an implied obligation to provide an employee with reasonable notice of his/her termination.

The legal rationale behind this principle is to put the employee in the same position as if the employee received working notice of his/her termination. As a result, the employee is entitled to receive whatever compensation he/she would have received over the notice period.

Aggravated damages

The purpose of aggravated damages is to compensate the employee for an intangible loss (e.g. for mental distress or loss of reputation). In order to award these types of damages, the employee must lead actual evidence of the aggravation. Importantly, normal hurt feelings will not support an award of aggravated damages.

Punitive damages

Finally, we have punitive damages. Punitive damages are not compensatory and are therefore intended to punish the defendant for particularly bad conduct. The purpose is retribution, deterrence and denunciation.

Employers behaving badly

Two recent cases provide a good illustration of the risks employers run when they fail to discharge their duty of good faith in their dealings with their employees.

In *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, Vicky Strudwick sued her former employer for wrongful dismissal after she was dismissed without cause. Several months before her dismissal, Ms. Strudwick suddenly became completely deaf.

In response, Ms. Strudwick's immediate supervisor, together with the company's general manager, began a campaign of harassment related to her disability. The employer did not defend the action and was noted in default.

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Damages award

After denying the employer's motion to have the default set aside, the motions judge awarded Ms. Strudwick $113,782.79 in damages. Ms. Strudwick subsequently appealed the damage assessment on the basis that her former employer's conduct warranted a higher damage award.

Court of Appeal

The Court of Appeal agreed with Ms. Strudwick and increased the total damages to $246,049.92. In so doing, the court highlighted some of the employer's egregious conduct. Such conduct included her supervisor purposely giving Ms. Strudwick instructions in a manner that prevented her from lip reading.

Her supervisor also would call her "stupid" and routinely suggest to her that she quit or "go on disability." The court noted that the company had made no attempt to accommodate Ms. Strudwick's disability and actually took steps to exacerbate her challenges.

Finally, the court condemned the employer for dismissing Ms. Strudwick in front of another employee after publicly humiliating her in front of a larger group of employees.

Bad faith

The defendant employer experienced a similar fate in the Ontario Superior Court of Justice's decision in *Morison v. Ergo-Industrial Seating Systems Inc*. In that case, the employer dismissed its regional manager allegedly for cause due to various performance issues.

At trial, the employee argued that there was no basis for his just cause dismissal and that the allegations of cause were made in bad faith to facilitate a more favourable settlement. The judge agreed.

In his reasons, the judge noted that the employee generally met and exceeded his sales target. However, even more problematic was the judge's observation that the employer "... essentially admitted that [the employee] was one of [its] top performers."

Accordingly, calling the employer's conduct "a classic example of bad faith," the judge awarded the employee approximately $150,000 in damages, including $50,000 in punitive damages.

Significance

Given this trend of increasing damage awards, employers should be vigilant in supervising how their managers treat their subordinates, and in how they deal with investigations and requests for accommodation. In addition, an employer who intends to dismiss an employee for just cause must ensure that its claim of just cause dismissal is not simply a negotiating tactic aimed at extracting a more favourable settlement.

To proceed otherwise risks an increased financial penalty and a potential public relations nightmare, resulting in significant damage to the company's brand.

REFERENCES: *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520, 2016 CarswellOnt 10413 (Ont. C.A.); *Morison v. Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725, 2016 CarswellOnt 17433 (Ont. S.C.J.) at para. 35.

TELECOMMUNICATIONS

CRTC sets wholesale high-speed ISP rates

Stephen Zolf,
Aird & Berlis LLP

The CRTC's establishment of interim rates for wholesale high-speed Internet services will have a significant impact on the landscape for competitive wholesale HSA access.

The rates charged for Internet access to Canadian households and businesses continue to be a "hot button" issue. While the retail rates charged by Internet service providers ("ISP"s) are not regulated by the CRTC, what gets less attention is the fact that the provision of wholesale high-speed access ("HSA") services by large cable and telephone carriers to "non-carrier" competitors *is* regulated.

The CRTC oversees competitor access to obtain high-speed paths to serve their retail Internet customers' premises throughout each incumbent carrier's operating territory. Thus, non-incumbent ISPs are both "customers" and "competitors" of the incumbents.

Balancing act

The CRTC is therefore required to balance competing interests: it must set wholesale rates charged by the incumbents to competitors to permit cost recovery. At the same time, it must ensure that the wholesale rates paid by the non-incumbent competitors will nevertheless be sufficiently low to foster a viable business model.

If this balance is achieved, then robust competition between the incumbent cable and telephone carriers, and the non-incumbents for downstream retail Internet service will ensue.

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hrreporter.com
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Ontario MOL clarifies interpretation of 'critical injury’

Considers amputation of more than 1 finger or toe critical injury

The Ontario Occupational Health and Safety Act requires employers to report fatalities and “critical injuries” to the Ontario Ministry of Labour.

The Ministry of Labour has recently released clarification on its interpretation of “critical injury” — in particular, clauses 1(d) and (e) of the definition of “critical injury.” It is important to note that this is not an amendment to the definition of “critical injury"; rather, it is an update to the Ministry of Labour’s internal interpretation, which interpretation courts do not have to accept.

Section 1 of Ontario Regulation 834 under the OHSA defines “critical injury” as an injury of a serious nature that,

(a) places life in jeopardy,

(b) produces unconsciousness,

(c) results in substantial loss of blood,

(d) involves the fracture of a leg or arm but not a finger or toe,

(e) involves the amputation of a leg, arm, hand or foot but not a finger or toe,

(f) consists of burns to a major portion of the body, or

(g) causes the loss of sight in an eye.

Clause 1(d) states that a “critical injury” includes the fracture of a leg or arm but not a finger or toe. The Ministry of Labour has clarified that it interprets the fracture of a leg or an arm to include the fracture of a wrist, hand, ankle or foot. In addition, while clause 1(d) excludes the fracture of a finger or a toe, the Ministry of Labour takes the position that the fracture of more than one finger or more than one toe does constitute a “critical injury” if it is an injury of a serious nature.

Clause 1(e) provides that a “critical injury” includes the amputation of a leg, arm, hand or foot but not a finger or toe. While the amputation of a single finger or single toe does not constitute a critical injury, the Ministry of Labour interprets the amputation of more than one finger or more than one toe to constitute a “critical injury” if it is an injury of a serious nature.

Notwithstanding the fact that the Ministry of Labour’s interpretation of “critical injury” is just that — the ministry’s interpretation, not the law — employers should be aware of the ministry’s interpretation in order to avoid a failure-to-report charge under the OHSA.

Chelsea Rasmussen

Chelsea Rasmussen is an associate at Dentons’ Toronto office, practising in employment and labour law. She advises and represents employers in all aspects of occupational health and safety matters, and defends employers charged with safety offences. Chelsea provides strategic advice in respect of workplace accidents, compliance orders, administrative penalties or charges, and day-to-day compliance. She can be reached at chelsea.rasmussen@dentons.com or (416) 862-3464. For more information, visit www.dentons.com or www.occupationalhealthandsafetylaw.com.

LEGAL ALERT

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Current Legal Developments Critical to Corporate Management

IN THIS ISSUE

Justice consists in doing no injury to men; decency in giving them no offence.

~ Marcus Tullius Cicero (106 BCE – 43 BCE)

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PENSIONS AND BENEFITS

Ontario pension plan members may form advisory committees

Mary Picard,
Dentons Canada LLP

Ontario registered pension plan members have significant new rights to information about their plans.

New Ontario legal requirements that came into force at the beginning of 2017 give significant rights to members of Ontario registered pension plans to form advisory committees. These new committees, if formed, will have the right to monitor all aspects of the administration and investment of their pension plans.

The requirements impose serious (and, potentially, costly) obligations on administrators of pension plans to assist with the establishment and ongoing support of member advisory committees.

Employer requirements

Employers and other administrators of Ontario registered pension plans should become familiar with the new requirements for two reasons. First, the timelines are tight. Plan administrators who receive a request to form an advisory committee will have to act quickly.

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CHARTER ISSUES

Supreme Court rejects damages claim against Alberta regulator

John B. Laskin
Torys LLP

The Supreme Court's recent refusal to award *Charter* damages against a regulator leaves unresolved the question of whether (and, if so, when) *Charter* damages can be awarded against a regulator.

Section 24(1) of the *Canadian Charter of Rights and Freedoms* provides (in broad terms) for remedies for breach of *Charter* rights and freedoms. It states that

> [a]nyone whose rights or freedoms, as guaranteed by [the] *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court

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WHITE COLLAR CRIME
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Second, the new requirements could require administrators to provide far more extensive information about their pension plans than they have been used to providing.

Administrators who fail to take note of the new requirements are exposing themselves to risks of non-compliance with fiduciary obligations and inadvertent disclosure of information that was not intended to be disclosed to plan members.

Application

The new requirements apply to defined benefit and defined contribution pension plans registered in Ontario. They do not apply to Group RRSPs (registered retirement savings plans), nor other non-registered employee savings plans. Pension plans with fewer than 50 members (including retirees) are exempt from the requirements. Certain types of multi-employer and jointly-sponsored plans are also exempt.

Process

The new requirements come into play if there is a request from at least ten members of a plan (including retirees) or a union that represents plan members. If the members or union request that an advisory committee be formed, the plan administrator must follow a prescribed process to communicate the request with all plan members, distribute materials and conduct a vote.

There are no prescribed requirements as to exactly *how* the vote must be conducted. It may be conducted in person, electronically or by mail. There are strict timelines as to when the administrator must act. Within 30 days of receiving a request, the administrator must communicate with the members or union who request the committee.

And, within 90 days of receiving a request, the administrator must communicate with all plan members and conduct a vote. Note that it is the plan administrator's legal obligation, not the obligation of the members or union, to ensure that member communications are distributed and the vote is conducted.

Specific requirements

An advisory committee is established if a majority of the votes cast are in favour of forming such a committee. In that case, the pension plan administrator is required to do several things, including:

- facilitate appointments to the advisory committee and hold the initial meeting of the advisory committee,
- give the committee or its representative information about the pension plan that the committee requests;
- make the plan actuary available to meet with the committee at least annually (if the plan provides defined benefits),
- ensure that the committee has access to an individual who can report on the investments of the pension fund at least annually, and
- provide administrative assistance to the committee.

Monitoring function

An advisory committee does not have any legal authority to dictate how the plan should be administered. The new rules say simply that,

> [T]he purposes of an advisory committee are (a) to monitor the administration of the pension plan; (b) to make recommendations to the administrator respecting the administration of the pension plan; and (c) to promote awareness and understanding of the pension plan.

Significance

Although the concept of enhanced disclosure to plan members is laudable, senior management and legal counsel to employers and other pension plan administrators should be

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informed and cautious about these new requirements. An immediate issue of concern is the question of who pays for the costs of establishing and running the advisory committee.

The new rules say that reasonable costs related to the establishment and operations of the committee are payable out of the pension fund. For a defined contribution pension plan, this could be problematic since it would require individual member accounts to be debited.

Disclosure

A more serious issue relates to disclosure. Prior to 2017, Ontario pension legislation set out a very clear, limited list of documents that unions and members were entitled to receive on request. The disclosure obligations of administrators are now far less clear, and potentially far more extensive.

The new rules say that the administrator is required to give to the advisory committee, on request, "such information as is under the administrator's control and is required by the committee or its representative for the purposes of the committee." There is no guidance as to how far this vague disclosure obligation could extend.

A prudent manager (or other company stakeholder involved with the management of an employer's pension plan) should pause in the preparation of minutes of management meetings, legal opinions, consultants' advice and all other materials that address the pension plan.

It is possible that these new rules will require disclosure of such materials to advisory committees that were previously not required to be disclosed to plan members and unions.

Governance processes

There are governance documentation approaches that can be used by employers who sponsor pension plans to reduce the risks of inadvertent disclosure of material that should be kept confidential from plan members and unions. The new rules regarding advisory committees should prompt employers to consider whether their governance processes are appropriate.

REFERENCES: *Pension Benefits Act*, R.S.O. 1990, c. P.8, section 24, and O. Reg. 351/16 which amended section 65 of Reg. 909 of R.R.O. 1990.

Charter Issues *continued from page 89*

considers appropriate and just in the circumstances.

Purposes of damages award

In its 2010 decision in *Ward v. Vancouver (City)* ("Ward"), the Supreme Court of Canada confirmed that an award of damages against the government — "to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights" — may be an appropriate and just remedy.

The Court observed that damages may serve three interrelated purposes that further the objects of the *Charter*:

(1) compensation of the claimant for a breach of rights that causes personal loss;
(2) vindication of the *Charter* right by emphasizing its importance and the gravity of the breach; and
(3) deterrence of future breaches.

Exceptions

However, the Court also recognized that there may be countervailing factors that make a damages award inappropriate and unjust, even where it serves one or more of these three purposes. It identified two of these factors in particular: the availability of adequate alternative remedies and concerns for good governance.

The latter factor, it stated, would apply where "s. 24(1) damages would deter state agents from doing what is required for effective governance."

Criminal context

Since the Ward decision, there have been many cases in which *Charter* damages have been awarded. The vast majority of these awards have been made in the criminal law context — for example, for wrongful non-disclosure by the Crown or for unlawful searches, detentions or arrests.

Regulatory context

In its recent decision in *Ernst v. Alberta Energy Regulator* ("Ernst"), the Supreme Court had an opportunity to consider whether *Charter* damages could be an appropriate and just remedy in a different context — the regulatory context. While the Court discussed a number of the issues that a damages award in this context would raise, the division among the judges resulted in there being no majority decision on this question.

At a minimum, however, the Court's decision serves to highlight the issues that will have to be addressed when *Charter* damages are again sought against a regulator.

Facts

The circumstances of the *Ernst* case were unusual. Ms. Ernst is an Alberta landowner who actively opposed fracking and drilling in the vicinity

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Changes to the Canada Pension Plan: a field guide for Ontario employers

By Mary Picard

Are you an employer who is uncertain about what you should be doing to prepare for the changes to the Canada Pension Plan (CPP)? This guide will help you.

The changes were announced by the federal government a year ago, and formal rules became law at the end of 2016. Unlike the infamous Ontario Retirement Pension Plan, these government-run pension changes are here to stay.

Here is a summary of the changes.

Mandatory contributions to the CPP by employers and employees will increase, starting January 2019. The increases will be phased in gradually over several years. By 2023 employers and employees will each be paying 5.95% of their eligible income to the CPP. Right now they are each contributing 4.95% of eligible income.

It's a significant increase in contributions. The combined employer and employee mandatory contributions to the CPP will go from 9.9% of employees' eligible income to 11.9% of their eligible income. That's a 21% increase.

And it's an even *bigger* hit for higher-income employees and their employers. Anyone with an annual salary of more than $70k (approximately), and their employers, will have to make *additional* contributions commencing 2024.

The upside is that the amount of the CPP benefit paid to Canadians will increase. It is expected that the annual benefit paid by the CPP will increase by as much as 50%. In today's dollars, the maximum CPP annual payout would go from $13,370 to $20,000. This full enhancement to the CPP benefit probably won't be seen for approximately 40 years.

If you have Quebec employees, beware: the CPP does not apply. Changes to the *Quebec* Pension Plan are being considered, but it's not known whether or when any changes will be made.

January 2019 is not far away. If you will be making changes to retirement and savings plans as a result of the CPP changes, you may want to communicate those changes to employees in the next year or so.

As a starting point, here are some high-level strategic suggestions:

If you have a Group RRSP or defined contribution pension plan:

- Consider whether to reduce the amount of required employee contributions to your plan, so that there will be little or no impact on your employees' take-home pay.
- Consider reducing employer contributions to your Group RRSP or defined contribution pension plan, so that the overall employer costs of contributing to the CPP and your employer-sponsored plan remain level. If you decide to do so, communicate the changes to employees now, so they are well aware in advance of any changes.

If you have a defined benefit pension plan:

- Find out if there is anything in your pension plan that relates to the CPP. Are employee contributions computed based on how much they contribute to the CPP? Is there a "bridge benefit" that relates to the CPP?

- Ask your actuary whether the liabilities of your pension plan will increase as a result of any provisions that relate to the CPP.
- Consider amending your pension plan to lessen the impact of the CPP changes, if any, on the design of your plan.

If you have a union:

- Find out if there are sections of the collective agreement that will restrict you from making changes to your retirement savings plans. Consider letting the union know, in collective bargaining, that changes may be made due to CPP changes.
- If the term of the collective agreement goes beyond 2018, formulate a plan to communicate to the union the fact that employee take-home pay will go down as a result of higher CPP contributions.

Please contact a member of the Dentons Canada pension and benefits group for assistance in understanding how the CPP changes will impact your organization. Be prepared.