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## $250,000 fine against school board may be largest-ever against not-for-profit organization in Ontario

***Worker killed when lifting device fell on him; worker was alone at the time***

By Adrian Miedema

A school board has been handed a $250,000 fine under the Ontario Occupational Health and Safety Act after the death of a maintenance worker.

The maintenance worker had been assigned the task of replacing a safety cage on a ceiling light in a high school gymnasium. He was working alone. While he was rolling a portable aerial device (a type of lifting device) down a ramp off a trailer, the aerial device tipped over and struck the worker, fatally injuring him.

The angle of the ramp was about eight degrees, while the manual for the aerial device stated that it should not be rolled down an incline greater than five degrees.

The school board pleaded guilty to the OHSA charge of failing as an employer to take every precaution reasonable in the circumstances for the protection of a worker. In particular, the school board failed to ensure that the angle of the ramp was five degrees or less; that the aerial device was rolled down the ramp with its mast on the upper or high end of the ramp to lessen the possibility of it tipping; and that there was another worker present to assist.

The court imposed the fine of $250,000 plus the 25 per cent Victim Fine Surcharge, for a total of $312,250. This appears to be the largest fine ever in Ontario under the OHSA against a not-for-profit or charitable organization. The case shows that charities and not-for-profits are not immune from charges and fines under occupational health and safety legislation.

*Adrian Miedema is a partner with Dentons Canada LLP in Toronto. He can be reached at (416) 863-4678 or adrian.miedema@dentons.com. Adrian's discussion of this case also appears in the Dentons blog www.occupationalhealthandsafetylaw.com.*

Article Full Text: http://www.employmentlawtoday.com/articleview/27693-250000-fine-against-school-board-may-be-largest-ever-against-not-for-profit-organization-in-ontario#sthash.lnRfyCAT.dpuf

# Commercial Property and Leases *continued from page 14*

to grant consent. How and to what extent the ruling in this case could affect other commercial transactions is yet to be determined.

REFERENCES: *Hudson's Bay Co. v. OMERS Realty Corp.*, 2016 ONCA 113, 2016 CarswellOnt 1753 (Ont. C.A.) at paras. 14, 15 and 21, affirming 2015 ONSC 4671, 2015 CarswellOnt 11740 (Ont. S.C.J.) at paras. 19 and 50; *Commercial Tenancies Act*, R.S.O. 1990, c. L.7; See: *Land Titles Act*, R.S.O. 1990 c. L.5 at s. 67 and *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.*, 1998 CarswellOnt 4423, 41 O.R. (3d) 577 (Ont. C.A.) at para. 33; *Lehndorff General Partner Ltd., Re*, 1993 CarswellOnt 183, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]) at paras. 17-20.

**EMPLOYMENT LAW**

# Updates to workplace sexual harassment law

**Andy Pushalik and Sabrina Serino,**
*Dentons Canada LLP*

**Amendments to Bill 132 and a review of recent case law demonstrate the seriousness with which the legislature and the courts regard workplace sexual harassment.**

The issue of workplace harassment, particularly sexual harassment, continues to garner the attention of policy makers. As a result of recent legislative developments, employers will soon be subject to additional obligations designed to ensure that workplaces are free from sexual harassment and that incidents and complaints of sexual harassment are addressed and investigated.

A review of recent case law also indicates that adjudicators are becoming more willing to make sizable damage awards against employers who have failed to protect employees from sexual harassment.

## Ontario Bill 132

Leading the charge for this new system of regulation is Ontario. In October 2015, the Ontario Government introduced Bill 132, which Bill amends various existing statutes with respect to sexual violence, sexual harassment and domestic violence.

For employers, important changes stem from Bill 132's amendments to the *Occupational Health and Safety Act* (the "OHSA"). Bill 132 expands the OHSA's existing definition of "workplace harassment" to include "workplace sexual harassment."

## Employer obligations

Additionally, Bill 132 (as amended by the Standing Committee on Social Policy that reviewed Bill 132) requires employers, in consultation with the joint health and safety committee or a health and safety representative, to implement (and to review at least annually) a written program which sets out how incidents or complaints of workplace harassment will be investigated and dealt with.

Bill 132 also requires employers to advise both the worker who has allegedly experienced harassment and the alleged harasser (if s/he is a worker of the employer) *in writing* of the results of the investigation and of any corrective action that has been (or will be) taken.

Notably, Bill 132 gives an inspector the authority to order an employer to retain an impartial third party to conduct an investigation and prepare a report — all at the employer's expense.

## Status of Bill 132

Bill 132 received Royal Assent on March 8, 2016. The provisions of Bill 132 relating to the OHSA will come into force six months after that date of Royal Assent.

## Case law trend

There has also been a notable trend in the case law: adjudicators have been granting substantial damage awards against employers for incidents of sexual harassment occurring in the workplace. In *T. (O.P.) v. Presteve Foods Ltd.* ("*Presteve*"), the Ontario Human Rights Tribunal (the "HRTO") awarded $150,000 and $50,000 (to two employees, respectively) for the infringement of their rights contrary to the Ontario Human Rights Code (the "Code").

## Facts

In *Presteve*, the applicants were temporary foreign workers who came to Ontario from Mexico to work for the corporate Respondent, Presteve Foods Ltd. During the course of their employment, the applicants were subjected to unwanted sexual solicitations and advances by the personal respondent, the owner and principal of Presteve Foods Ltd.

## Code violations

The Applicants filed a claim with the HRTO, alleging discrimination with respect to employment because of sex, sexual harassment, sexual solicitations or advances and reprisal. The HRTO found the Corporate Respondent and

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Personal Respondent jointly and severally liable for violating the Code.

## Award

In awarding damages, the Vice-Chair took into consideration the vulnerability of the employees as migrant workers paired with the "unprecedented seriousness of the personal respondent's conduct."

The HRTO also ordered the Corporate Respondent to provide any workers hired under the auspices of the Temporary Foreign Workers Program with human rights information and training in the native language of any such hire for a period of three years from the date of the decision.

## Similar case

Similarly, in *Silvera v. Olympia Jewellery Corporation*, the Ontario Superior Court of Justice awarded an employee general damages — as well as aggravated and punitive damages totaling over $300,000, including $30,000 for breach of the Code — arising out of a series of sexual assaults, battery and racial harassment occurring during the course of her employment.

As an employee of Olympia Jewellery Corporation ("Olympia"), Silvera was subjected to a series of sexual assaults and harassment by her supervisor. Silvera's employment was eventually terminated without cause. Silvera brought an action for damages for wrongful dismissal and her supervisor's conduct.

## Quantum of damages

The court found in favour of Silvera. In determining the quantum of damages, the court noted that Silvera's supervisor had "tak[en] advantage of" Silvera and his conduct was "high handed".

The court also determined that Olympia was vicariously liable for the supervisor's acts: the supervisor was the "operating mind" of Olympia and Olympia materially increased the risk of sexual assault and harm based on the supervisor's specific duties, which gave rise to special opportunities for wrongdoing.

As such, the court awarded the following: (a) $90,000 for general and aggravated damages; (b) $10,000 for punitive damages; (c) $30,000 for breach of the *Human Rights Code*; (d) $42,750 for costs of future therapy care; (e) $37.18 for the subrogated OHIP claim; and (f) $33,924.75 for future lost income.

Additionally, Olympia was ordered to pay Silvera $90,344.63 for wrongful termination. The defendants were also ordered to jointly and severally pay Silvera's daughter $15,000 in damages under the *Family Law Act*.

## Significance

Viewed together, the developments noted above highlight the role employers are expected to take in addressing and preventing workplace sexual harassment. Bill 132 requires employers to actively update and review their workplace harassment policies and programs, and to conduct investigations (at their own expense) in response to incidents and complaints of workplace sexual harassment.

Additionally, the cases reviewed above illustrate that adjudicators are becoming more willing to award substantial damage awards against employers who fail to take reasonable steps to prevent incidents of harassment from occurring in the workplace.

The risk of liability and increased damages appears to increase when the perpetrator of the impugned conduct is considered the "operating mind" of the organization. Accordingly, employers should take all necessary steps to educate their workforce on harassment and the penalties that may result from an employee's poor judgment.

REFERENCES: *T. (O.P.) v. Presteve Foods Ltd.*, 2015 HRTO 675, 2015 CarswellOnt 12338 (Ont. Human Rights Trib.); *Silvera v. Olympia Jewellery Corp.*, 2015 ONSC 3760, 2015 CarswellOnt 9277 (Ont. S.C.J.).

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# TTC moving forward with random drug and alcohol testing

***But union seeking injunction from arbitrator***

By Liz Foster

More than four years into arbitration over its "Fitness for Duty" policy, the Toronto Transit Commission (TTC) is moving forward with random drug and alcohol testing of employees.

Such testing has technically been part of the Fitness for Duty policy since 2011 but funding for the program wasn't approved. Before the company could move forward with the policy, Amalgamated Transit Union (ATU) Local 113 — the union representing a majority of the TTC's employees — took the issue to arbitration.

On April 18, TTC CEO Andy Byford said in a letter to employees the TTC board had approved funding for the random testing. Byford also announced the TTC would be lobbying the Ontario government to consider legislation that would make random drug and alcohol testing mandatory for public transit agencies.

Currently, the TTC tests for drugs and alcohol after an incident occurs, after an employee returns from a treatment program, during pre-employment and in any instance it has reason to believe an employee is under the influence, according to Byford.

"This is a safety issue," said Brad Ross, executive director of corporate communications at the TTC. "We have a responsibility as an employer to our 14,000 employees, as well as a responsibility to our 1.8 million daily riders to provide the safest transit system we possibly can."

Instances of impairment or refusal to take an impairment test are on the rise among employees, said Ross, and random testing will act as a deterrent.

Employees would be required to submit to a breathalyzer test and submit an oral fluid sample, he said. The program — designed to detect alcohol, marijuana, cocaine, opiates, amphetamines and phencyclidine — would be administered by a third party.

It would work on a pass-fail basis and be designed to determine whether an employee was impaired at the time of the test, not to determine whether employees consume drugs or alcohol in general, said Byford.

## Union opposition

Despite the ongoing arbitration, the TTC said it is working to finalize the program.

But Local 113 criticized the TTC's decision.

“We take the position that we’re in arbitration,” said its president Bob Kinnear.

“We’re to wait for the arbitrator’s decision because that’s what the parties agreed to. That’s the process that we agreed to. Having said that, it looks like the TTC is just going to arbitrarily implement it. So we are looking at our legal options. We’re trying to go back in front of the arbitrator to ask the arbitrator to impose an injunction on the TTC to say that they cannot (implement the program) until the proceedings are concluded.”

If the arbitrator is unable or unwilling to grant the injunction, said Kinnear, the union will pursue an injunction through the court system.

In 2013, Canada’s Supreme Court ruled that random drug and alcohol testing was not justified in the workplace unless the employer could provide evidence of a substance abuse problem among the workforce.

“The TTC just doesn’t reflect that at all,” said Kinnear.

“This is negatively impacting employees. It casts an aspersion over employees. The company is moving forward in the way that it casts an aspersion over our employees to suggest that there’s somehow some systemic drug and alcohol problem at the TTC, when it’s just not the case.”

When the TTC originally moved to implement random drug and alcohol testing, the union proposed an alternative, said Kinnear. Because sleep deprivation is a serious contributor to impairment in transit employees, the union hoped the TTC would introduce optical scanners in the workplace. Optical scanners would determine impairment but would not conclude whether that impairment was due to sleep deprivation or the use of drugs or alcohol.

“We know in the transit industry that the most pressing impairment we face is sleep impairment or lack of sleep because of the hours we work, because of the shift work we do,” said Kinnear.

“Our operators are out there 12.5 hour a day, five days a week. The TTC didn’t even sit down to talk with us about it. They didn’t entertain it in any way, shape or form.”

Random testing would infringe on employees’ privacy, said Kinnear. TTC employees would be required to provide their employer with medical information — such as any medication that could potentially alter testing results — to the employer.

Another concern for the union is the lack of access and information.

“There’s no recourse for us as representatives of the employees,” said Kinnear.

“If the test comes back positive, that’s it. So there’s a lot of concern with how that test is being handled, how it’s being conducted and what the conclusion of that test is.”

**Steps required**

There are several steps the TTC needs to take before imposing its policy, said Chelsea Rasmussen, an employment and labour associate at Dentons Canada in Toronto.

“If the employer unilaterally introduces the policy under the management rights clause of the collective agreement, this could raise the issue that the policy is an unreasonable exercise of management rights, with unions often arguing because of the intrusion on the employees’ right to privacy,” she said.

“We would suggest that employers implement a confidential and secure process for the actual taking of the sample, testing the sample, returning the sample to the workplace and also for communicating the results to the employee that had been tested.”

The TTC will need to ensure employees are fully aware they are subject to a random drug and alcohol testing policy, said Rasmussen.

To justify the policy, the TTC would need to show it represents a proportionate response to the safety concerns of the workplace while also balancing the competing interests of employee privacy, she said.

“The testing should also be limited to determining the actual impairment of the employee’s ability to perform the essential duties of their safety-sensitive job, it shouldn’t be directed toward simply identifying the presence of drugs or alcohol in the body,” said Rasmussen.

As well, a comprehensive drug and alcohol testing policy should also include measures for accommodating employees struggling with addiction, she said.

Currently, there is nothing preventing the transit commission from implementing the policy, said Rasmussen.

However, if the arbitrator ultimately concludes the policy is not justified in the circumstances, the policy would likely be found in violation of the collective agreement and the employer would have to revisit the practice.

“It’s a big issue in human rights,” said Rasmussen, “in both a unionized and non-unionized context.” -

Article Full Text: http://www.hrreporter.com/articleview/27632-ttc-moving-forward-with-random-drug-and-alcohol-testing#sthash.Wh9Ev39r.dpuf

# Commercial Property and Leases *continued from page 93*

This is an important distinction. Under the Act, each party is not required to use, deliver or accept an e-signature. The Act only permits the use of an e-signature. Paper documents are still equally acceptable.

### Consent

Further, each party must consent to the use of e-signatures. Note that consent may be inferred by conduct. (See, for example, s. 3(2) of the Act). If both parties do consent to the use of e-signatures, this may eliminate the need for original, "paper" documents.

In many real estate transactions, documents are signed in counterpart and transmitted by fax or e-mail with originals to follow post-closing. The amendments to the Act would allow the parties to skip this last step in the transaction.

By agreeing to sign electronically, both parties can simply fax or email PDF signed copies of the documents to each other (in a form that cannot be altered) instead of providing original, signed copies.

### "Know your client" rule

These amendments do not affect the "know-your-client" rules that apply to lawyers, real estate agents and financial institutions. Regardless of the type of signature being used, parties involved in real estate transactions should still employ prudent practices.

Considerations such as determining the identities of each party and ensuring that all parties are signing the same documents should continue to be followed, as well as establishing the authenticity of the e-signature being used to sign the agreements.

REFERENCES: *Electronic Commerce Act, 2000*, S.O. 2000, c. 17.

**EMPLOYMENT LAW**

# Recent decisions underscore key considerations

**Andy Pushalik and Sabrina Serino,**
*Dentons Canada LLP*

**Recent employment law decisions will shape workplace policy now and in the future.**

A number of interesting legal developments in 2015 will impact workplaces for years to come. The cases canvassed below warrant special mention.

### *Potter* decision

In *Potter v. New Brunswick (Legal Aid Services Commission)* ("*Potter*"), the Supreme Court of Canada clarified the common-law test for constructive dismissal. The Court noted that the test for constructive dismissal has two branches. Under the first branch, the court must determine whether a breach has occurred.

This exercise requires the court to consider whether there is an express or implied term that gives the employer the authority to make the change. If the employer has the authority to make the change or the employee consents to the change, there will be no breach because the change will not be considered a unilateral act.

If a breach has occurred, the court must consider whether a reasonable person would have felt that the essential terms of the employment contract were being substantially changed.

Under the second branch, the court will consider whether the employer has engaged in conduct that, when viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract.

In *Potter*, the Court held that an employee on an indefinite suspension with pay was constructively dismissed by his employer and, as such, was entitled to damages for wrongful dismissal.

### *Kielb* and *Paquette* decisions

In *Kielb v. National Money Mart Co.* ("*Kielb*") and *Paquette v. TeraGo Networks Inc.* ("*Paquette*"), the Ontario Superior Court of Justice clarified that an employee can be denied a bonus payment upon termination based on the provisions of an employment contract.

In *Kielb*, the plaintiff commenced employment with the defendant employer under the terms of an employment contract that provided that any bonus which may be paid is discretionary, does not accrue, and is only earned and payable on a date determined by the employer.

The defendant terminated the plaintiff on a "without cause" basis before the bonus payment date provided for by the defendant. As such, the plaintiff did not receive any bonus payment in respect of the current fiscal year.

The court held that despite the fact that the bonus payment formed an integral part of the plaintiff's compensation, the plaintiff was not entitled to the bonus payment based on the clear and unambiguous language of the employment contract. The court confirmed that,

> the harshness of [a] provision does not make it invalid if both parties have agreed to it.

Similarly, in *Paquette*, the plaintiff sought entitlement to a bonus after being dismissed without cause by the defendant employer. The defendant's bonus program required employees to be

*See Employment Law, page 95*

"actively employed" on the date of the bonus payout to be eligible for a bonus.

The court held that although the bonus payment was integral to the plaintiff's compensation, the terms of the bonus program clearly limited eligibility to those employees who were actively employed on the payout date.

While the plaintiff may have "notionally" been an employee during the reasonable notice period provided, he was not an "active employee" and, therefore, did not qualify for the bonus.

### *Wilson* decision

In *Wilson and Atomic Energy of Canada Ltd., Re* ("*Wilson*"), the appellant employee filed a complaint against the respondent employer under s. 240 of the *Canada Labour Code* (the "*Code*") stating that he was unjustly dismissed.

The employee was terminated on a "without cause" basis after over four years of service with the employer and received a severance package equal to six months' pay.

The employee submitted that an employee who is dismissed without cause is, by that reason alone, unjustly dismissed within the meaning of the *Code* and is therefore entitled to a remedy. The adjudicator concluded that the employee was dismissed without cause and had made out a complaint of unjust dismissal under the *Code*.

The employer applied to the Federal Court for judicial review. The Federal Court quashed the adjudicator's decision and remitted the matter back to the adjudicator. The employee then appealed to the Federal Court of Appeal.

On appeal, the Federal Court of Appeal held that "without cause" dismissals are not automatically deemed to be "unjust" under the provisions of the *Code*. As such, adjudicators must examine the circumstances of each particular case to decide whether a dismissal is unjust. Note that this case is under appeal to the Supreme Court of Canada.

### *Keenan* decision

In *Keenan v. Canac Kitchens Ltd.*, the plaintiffs, a husband and a wife, both worked for the defendant as employees from 1983 to 1987. In 1987, the defendant notified the plaintiffs that they would no longer be employees; instead, they would carry on their work as independent contractors.

The defendant ultimately closed its operations in 2009 and informed the plaintiffs that it no longer required their services. The plaintiffs argued that they were dependent contractors and were entitled to reasonable notice at common law.

Given that the business arrangement was almost exclusively for the defendant's benefit, the court concluded that the plaintiffs were dependent contractors and awarded them 26 months' pay in lieu of notice.

*The cases noted above provide important lessons for employers that will shape workplace policy now and in the future. Viewed together, the decisions highlight crucial considerations for employers at all points of the employment relationship.*

### *Gordon* decision

In *Gordon v. Altus Group Ltd.*, the defendant employer dismissed the plaintiff for just cause; however, the court found no basis for the just cause termination of the employee. In the court's view, the employer's claims about the employee's misconduct were improperly exaggerated to support a claim of just cause.

The court stated that the conduct of the employer was

> outrageous because [the employer] got mean and cheap in trying to get rid of an employee.

As a result, the court awarded the employee $100,000 in punitive damages, plus approximately nine months' pay in lieu of notice.

### Significance

The cases noted above provide important lessons for employers that will shape workplace policy now and in the future. Viewed together, the decisions highlight crucial considerations for employers at all points of the employment relationship.

To limit liability, employers should continue to take steps to ensure that employment contracts are drafted using clear and unambiguous language, and that all legal and contractual obligations are considered when terminating an employment relationship.

We have no doubt that this year will yield new legal developments that will continue to keep employers (and their counsel) on their toes!

REFERENCES: *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10, 2015 CarswellNB 87, 2015 CarswellNB 88 (S.C.C.); *Kielb v. National Money Mart Co.*, 2015 ONSC 3790, 2015 CarswellOnt 9377 (Ont. S.C.J.) at para. 38, additional reasons 2015 ONSC 6460, 2015 CarswellOnt 16552 (Ont. S.C.J.); *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189, 2015 CarswellOnt 9801 (Ont. S.C.J.), additional reasons 2015 ONSC 4932, 2015 CarswellOnt 11949 (Ont. S.C.J.); *Wilson and Atomic Energy of Canada Ltd., Re*, 2015 FCA 17, 2015 CarswellNat 64, 2015 CarswellNat 4803, (*sub nom.* Wilson v. Atomic Energy of Canada Ltd.) [2015] 4 F.C.R. 467 (F.C.A.), leave to appeal allowed 2015 CarswellNat 2531, 2015 CarswellNat 2532 (S.C.C.); *Keenan v. Canac Kitchens Ltd.*, 2015 ONSC 1055, 2015 CarswellOnt 2322 (Ont. S.C.J.), affirmed 2016 ONCA 79, 2016 CarswellOnt 965 (Ont. C.A.); *Gordon v. Altus Group Ltd.*, 2015 ONSC 5663, 2015 CarswellOnt 13871 (Ont. S.C.J.), additional reasons 2015 ONSC 6642, 2015 CarswellOnt 16313 (Ont. S.C.J.).

# New era of pension regulation

*Rules in Ontario designed to address challenges of pension savings that are both ethical and safe.*

**By Patricia Chisholm**

HUAN TRAN

Pension savings that are both ethical and safe: These goals can be at odds, especially in a world of declining market returns and rising public debate about what is, and is not, socially responsible investing.

New rules in Ontario are designed to at least partly address both of these challenges. So far, the changes relating to socially responsible investing have received the most attention. Known as ESG — for environmental, social, governance — the new rules do not mandate ESG investments, but they do require pension plan sponsors, generally employers, to file pension investment statements that detail whether ESG factors have been incorporated into a pension fund's investment policies.

Kathryn Bush, a partner at Blake Cassels & Graydon LLP in Toronto, says public awareness of ethical investing has been rising. "Whatever you are doing, it's other people's money that you are holding. And there has been pressure from those people — the beneficiaries — questioning how those monies should be used. The question may be armaments, or pollution, but people are saying, 'You're taking my money and I don't like what you're doing with it.'"

At the same time, pension regulators in Ontario are taking steps to increase the oversight of defined-contribution pension plans, which are growing in popularity as the number of defined-benefit pension plans continues to shrink. New rules in this area, notes Mary Picard, a partner at Dentons LLP in Toronto, are putting some welcome "backbone" into the oversight of DC plans, especially for smaller and medium-sized employers. These steps should help improve the monitoring of these funds, notes Picard, with positive results for both sponsors and plan members.

The tool being used by Ontario to accomplish these aims is the "Statement of Investment Policies and Procedures" or SIPP. While plan sponsors were previously required to maintain a SIPP, they now have to file this document with the pension regulator. The new rules came into force Jan. 1, with statements to be filed by March 1 (extensions have been granted in many cases). The SIPP must include information on whether the sponsor has given consideration to ESG factors when it chooses investments. And, with DC plans, several categories of new information will have to be included, most importantly additional, non-ESG-related details about how investments are chosen, monitored, and communicated with members.

In the case of the new ESG rules, sponsors will not be required to include such

investments in their pension plan portfolios. They only need state that they have given the matter consideration. And if investment funds with ESG elements are included in their portfolios, such choices must be consistent with the fiduciary duties owed to plan members by the plan sponsors. In other words, the choices in the pension fund must also be good investments. "So, there is this tension," notes Bush. "Members may not like certain investments, but what if cigarettes are a great investment?"

The origin of the new ESG rules goes back to 2008, when an expert commission in Ontario was charged with reviewing the sometimes opposing goals of members' concerns over the choices of investments versus the need to produce returns for their retirement years. Bush, who advised the commission, notes that it eventually agreed on a relatively soft provision that simply stated: "Plan statements of investment policies should reveal whether and if so how socially responsible investment practices are reflected in the plan's approach to investment decisions."

From a practical point of view, the new rules create challenges for pension fund administrators and employers who sponsor the funds. These range from trying to decide what constitutes an ESG factor, while trying to meet new filing deadlines; indeed, some experts suggest up to 130 issues may have to be considered, says Bush.

Then there is the difficulty of ascertaining what investments are actually in a fund: This latter issue is particularly troublesome for medium- and smaller-sized employers that contract out pension investment choices to professional fund managers, who manage pooled and segregated funds. Bush says, with many such funds now trading daily, the task of identifying what is in a fund becomes an ever-changing, even more difficult task. As a result, fund managers may also face new requirements to provide greater detail to plan sponsors about the types of investments they are choosing on behalf of plan members.

Deciding what is an acceptable investment and what isn't is not simple, she says. "Some people will say fossil fuels are good, some people will say they're not. What's the test? Is it pollution? Is it energy use? Is it sustainability?"

In addition, negative screens for ESG factors will not be enough. Simply ruling out tobacco or companies active in Sudan is not appropriate. "You can't just say, 'I don't like people who wear blue shirts.' You can't make that judgment," says Bush. Instead, plan sponsors must be more specific about why a company or sector has not been chosen, especially if such an investment is likely to benefit plan members financially.

There is help, however, for companies looking for guidance on making investment choices that consider ESG factors. Picard notes that plan sponsors without the massive investing teams and buying power typical of very large pension funds are at somewhat of a disadvantage in this area; typically, they will use pooled funds and allow the fund manager to make the specific investment choices. "In that world, the plan sponsors have been a bit startled by this [ESG] requirement and bewildered as to what they are supposed to do," says Picard.

She adds Ontario's pension regulator has been helpful by attending industry conferences and giving feedback on the new rules. It has also provided assistance on the web, such as FAQs designed to meet the concerns of firms that delegate investing strategies to others. In addition, for DC plans, the Ontario pension regulator has issued "Investment Guidance Note for Member Directed Defined Contribution Plans," which deals with their new, non-ESG monitoring and communication requirements. The guidance note includes information on the eight categories in which information should be included in a sponsor's SIPP.

Picard also highlights another new document, "Form 14," which provides a road map through the SIPP process for DC plans. "It's a thing of beauty," Picard says, noting the form lays out in great detail the steps pension sponsors should be following when filling out and filing their SIPPs.

This enhanced transparency is likely to be both an advantage and a risk for plan sponsors, says Picard. For instance, while regular monitoring of the fund will provide greater protection for sponsors from member allegations that they have not paid enough attention to the fund's performance, sponsors will also risk liability if they fail to do what they said they would do; potential missteps include such issues as monitoring only semi-annually when they had formally committed to quarterly reviews. Notes Picard: "I see this as being, finally, a true backbone to a regulator's efforts to impose good governance in the world of defined contribution plans."

However, DC plan sponsors also need to ensure they don't promise too much when reporting to employees. For instance, Picard says there is a trend toward some DC plan sponsors including projected income streams on pension plan statements to employees. That follows recent recommendations from the Canadian Association of Pension Supervisory Authorities, a national group, suggesting that pension plan administrators include projected account balances and income streams in their statements to employees. "I don't think employers realize how dangerous that is," Picard says, despite what appears to be airtight disclaimer language in such reports that aim to limit the employer's responsibility. "I wouldn't include projected income or account balances. As an employer, I just wouldn't." Employees tend to trust their employers, she says, and if actual income flows fall significantly short of what has been projected — as they may well do — employers may face some degree of liability.

Indeed, some firms have gone forward with such income stream estimates without the firm's senior executive being aware, says Picard. She notes human resources departments have been known to move forward on their own initiative in this area without appreciating the associated downside, including reputational risks, that can arise when disgruntled, retired employees later complain. Some firms are not even properly informed about the level of investing fees that are appropriate for pension fund pools and may unwittingly be reducing employees' returns by paying fees that are too high.

For Picard, the detail and methodical approach of Form 14 and guidelines for DC plans, while voluntary, will at least help improve the oversight of employees' hard-earned dollars. And it is likely to go a long way to giving regulators some teeth, when it comes to pursuing the most egregious examples of hapless employers who have done very little to ensure a pension plan performs well for its members. "Good on the Ontario regulators," Picard says. "They're doing their best to regulate in a field where there is little legislation." The new regime, at the least, will greatly enhance what regulators know about the administration of DC plans, Picard notes, a vital step in moving to improve that administration in the future. **CL**

Canadian Employment Law Today
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Mar 22, 2016

## Ontario gets tougher on sexual violence and harassment

***Province's sexual violence and harassment legislation, Bill 132, to become law Sept. 8, 2016***

By Sabrina Serino

Ontario's new sexual violence and harassment legislation, Bill 132, An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters, received Royal Assent on March 8, 2016.

Bill 132 amends various existing statutes with respect to sexual violence, sexual harassment and domestic violence. For employers, Bill 132 presents important workplace-related changes, by amending the Occupational Health and Safety Act (OHSA) to require employers to implement specific workplace harassment policies and programs and ensure that incidents and complaints of workplace harassment are appropriately investigated.

First, Bill 132 expands the OHSA's definition of "workplace harassment" to include "workplace sexual harassment", defined as:

> 1. Engaging in a course of vexatious comment or conduct against a worker in a workplace 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
>
> 2. Making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

Bill 132, however, also clarifies that a reasonable action taken by an employer or supervisor relating to the management and direction of its workplace is not workplace harassment.

The bill, as passed, requires an employer, in consultation with a joint health and safety committee or a health and safety representative (if any), to develop, maintain, and review at least annually, a written program that implements the employer's workplace harassment policy. Further, employers must provide workers with appropriate information and instruction on the contents of their workplace harassment policies and program. An employer's written program must set out, among other requirements:

- measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser
- how incidents or complaints of workplace harassment will be investigated and dealt with

- how information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless the disclosure is necessary for investigating, taking corrective action, or by law

- how a worker who has allegedly experienced workplace harassment and the alleged harasser (if he or she is a worker of the employer) will be informed of the results of the investigation and of corrective action that has been, or will be, taken.

Further, employers must conduct appropriate investigations in response to incidents or complaints of workplace harassment. Following an investigation an employer must inform both the worker who has allegedly experienced harassment and the alleged harasser (if he or she is a worker of the employer) of the results and of any corrective action that has been, or will be, taken.

Notably, an inspector now has the power to order an employer to conduct an investigation by an impartial third party, and obtain a written report by that party, all at the employer's expense. Bill 132, however, does not specify the circumstances in which an inspector can, or will, order an employer to conduct such an investigation.

The above- noted OHSA amendments come into force on Sept. 8, 2016. In order to ensure compliance with the legislation, employers must take steps beforehand to update and implement policies and programs related to workplace harassment.

*Sabrina Serino practices employment and labour law with Dentons in Toronto. She can be reached at (416) 863-4385 or sabrina.serino@dentons.com. Sabrina's discussion of this case also appears in the Dentons blog www.occupationalhealthandsafetylaw.com.*

Article Full Text: http://www.employmentlawtoday.com/articleview/27153-ontario-gets-tougher-on-sexual-violence-and-harassment#sthash.K316wVfc.dpuf

Canadian HR Reporter
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Mar 7, 2016

# Why do OHS injuries go unreported?

## *Having safety goal of 'zero' can be intimidating to employees, say experts*

By Liz Bernier

It certainly has a nice ring to it: "Our workplace has had zero lost-time injuries."

But the concept of zero — zero injuries, zero lost-time incidents, zero lost man hours — doesn't actually promote workplace safety the way employers intend; in fact, it creates hidden safety risks, according to Alan Quilley, president of Safety Results in Sherwood Park, Alta.

Workplaces that heavily promote the importance of occupational health and safety are certainly to be admired and commended but, at the same time, it's important to be aware of the safety risks, incidents, accidents and near misses that occur so they can be prevented from happening again, he says.

And too strong of a focus on "zero injuries" can unintentionally discourage employees from reporting incidents, says Quilley.

"Fundamentally, if you wonder why humans do things, it's because of what happens afterward — the consequences," he says. "Humans are driven by consequences."

Employers often have all kinds of good intentions and say they want to know whenever an employee is injured or has a near miss. That's unquestionably good information for the employer to know so, hopefully it can do something so that doesn't happen again, says Quilley.

"The upside for a corporation is pretty straightforward — why wouldn't you want to know about the bad things that happen? Because maybe then you can do things differently," he says.

"The problem from an employee perspective is 'What happens when I do (report)?'"

Employees understand reporting injuries or accidents is a good thing to do but they also know there may be consequences.

"That's where a lot of corporations go wrong — even though they intend it to be good, it's not. They don't take a view from the employee point of view and if they did, they would probably react differently," says Quilley.

"Corporations have gone out of their way to foolishly pick zero as this ultimate goal of safety, which doesn't make any logical sense whatsoever because just because you didn't hurt yourself, it doesn't mean you were safe.

“We set up these goals that humans have to be perfect and never hurt ourselves, which has got nothing to do with reality.”

When employers are working within that system and the entire goal is to have zero injuries, and employees are rewarded, bonused or incentivized on that basis, no one wants to be the one who messes up the track record, he says.

“The next thing that happens to me is I’m the guy who ruined everyone’s bonus. Nobody wants to be that person.”

There’s also the reputational risk an employee faces if he reports an incident and co-workers react badly, says Quilley.

“(For instance), an electrician almost electrocuted himself and he told (his employer) — as he should have. It was only his insulated pliers that actually saved his life. He was using the right piece of equipment,” he says.

“He told people and now his co-workers are calling him ‘Sparky.’ That’s an unintended consequence. And he said to me, ‘If I had to do it again, I wouldn’t (report it).’ He’s a good electrician, he’s just a human who made a mistake. And he doesn’t want to be known as Sparky… He takes pride in what he does, and now he’s being insulted by the very people he works with.”

Another factor that can have a significant impact in discouraging reporting is when a manager or supervisor reacts negatively when receiving the report, says Quilley.

“The other thing is I go tell my boss and he gives me a great big sigh,” he says.

“If that’s happened to me in the past, it becomes less likely I’m going to (report) again when if I just don’t tell, nothing bad is going to happen.

“I don’t tell and my life is simpler… I don’t have to do the work that it takes, I don’t have to put up with this negative reaction.”

Employers need to do away with the entire concept of zero injuries because mistakes are going to happen and it’s of critical importance to the safety of the workplace that employees actually come forward when they do, says Quilley.

“All of this is well-intentioned, it’s just foolishly delivered. If you want someone to tell you about (injuries and near misses), the next thing that happens to them has to be good,” he says, adding that positive consequences will likely increase the chances people will report again.

“It’s fundamentally the ‘What happens if I do, what happens if I don’t?’ question.”

**Legal consequences**

If the hidden risks and safety consequences aren’t enough to convince an employer of the importance of encouraging reporting, perhaps the legal consequences are.

Employers can be hit with a significant fine for failing to report or discouraging reporting of workplace injuries, according to Adrian Miedema, partner at Dentons in Toronto.

“There are serious consequences for either not reporting to both the WSIB (Workplace Safety and Insurance Board) and the Ministry of Labour — that’s an offence in and of itself that you can be charged with. And certainly for pressuring employees not to report, you can be charged with that too,” he says.

“Both under the Occupational Health and Safety Act and the Workplace Safety and Insurance Act, there’s a duty to report… There are pretty serious consequences and there are a bunch of cases where employers have actually been charged with failing to report.”

One Ontario employer, for example, was fined $20,000 in 2014 after HR staff and a supervisor failed to immediately report an injury to the provincial Ministry of Labour. The worker in that case had suffered a broken bone, which is considered a “critical injury” under the Occupational Health and Safety Act. In addition to the fine, the employer had to pay a 25 per cent victim fine surcharge, bringing the total cost of the incident to $25,000.

Also in 2014, an Ontario employer was fined $75,000 for failing to report an occupational disease claim, said Miedema.

Employers can also get into trouble for pressuring workers not to report, he says.

“If you think about the Workplace Safety and Insurance Act, if somebody’s injured at work and they’re pressured not to report, that’s an offence,” he says.

In fact, there is a specific provision in that act that says employers cannot pressure them not to report. Section 22.1(1) of Ontario’s act, which was just added to the Workplace Safety and Insurance Act last year, makes it an offence to commit “claim suppression.”

The fine can be up to $500,000 plus an administrative penalty, says Miedema.

There is just no reason for employers to avoid reporting.

“Quite apart from the fact that we always advise people to comply with the law, that kind of thing catches up to employers eventually. And if you get caught not reporting and, in particular, discouraging employees from reporting… then the consequences I think are really serious,” he says.

“No judge is going to be sympathetic to an employer that’s found to have pressured employees to not report workplace injuries.

“It’ll catch up to you eventually and the consequences will be a lot more serious if you don’t report.”

See more / full text:

http://www.hrreporter.com/articleview/26982-why-do-ohs-injuries-go-unreported#sthash.JjkwTvaF.dpuf

Canadian Employment Law Today
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Feb 23, 2016

## Waiver against lawsuit not enforceable for worker without workers compensation coverage

***Ontario employee entitled to sue employer after workplace injury, despite signing a waiver: Court***

By Adrian Miedema

An Ontario employee has won the right to sue his employer for damages for an injury suffered at work. An appeal court decided that a waiver he signed was, due to provisions in the Ontario Workplace Safety and Insurance Act, unenforceable.

The National Capital Kart Club held a go-cart event at which the employee acted as race director. The employee was injured after one go-kart driver crashed into hay bales. The employee sued his employer, the go-kart driver and others. The employer argued that a waiver, which the employee had signed, released them from any damages.

The employer was not required, under the Workplace Safety and Insurance Act, to be registered with the Ontario Workplace Safety and Insurance Board. Therefore the employee did not have workers compensation coverage.

The employee, on appeal, relied on the little-known Part X of the Workplace Safety and Insurance Act. Part X contains s. 114(1) which, the employee argued, made the waiver unenforceable. That section applies to workers whose employer is not registered, and not required to be registered, with the WSIB:

"114. (1) A worker may bring an action for damages against his or her employer for an injury that occurs in any of the following circumstances:

1. The worker is injured by reason of a defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises used in the employer's business or connected with or intended for that business.

2. The worker is injured by reason of the employer's negligence.

3. The worker is injured by reason of the negligence of a person in the employer's service who is acting within the scope of his or her employment."

The Court of Appeal for Ontario held that it was contrary to public policy to allow employers to have employees "contract out" of Part X of the Workplace Safety and Insurance Act (that is, sign a waiver giving up their rights, under Part X, to sue their employer for certain workplace injuries). As such, the waiver was unenforceable and the employee's lawsuit could proceed.

Employers that are not registered with the WSIB, and not required to be registered, should review their use of waivers — including waivers for company events. As a result of this decision, waivers signed by employees will not be enforceable to prevent the employee from suing the employer for certain injuries, including injuries caused by the employer's negligence.

For more information see:

- Fleming v. Massey, 2016 CarswellOnt 924 (Ont. C.A.).

*Adrian Miedema is a partner with Dentons Canada LLP in Toronto. He can be reached at (416) 863-4678 or adrian.miedema@dentons.com. Adrian's discussion of this case also appears in the Dentons blog www.occupationalhealthandsafetylaw.com*

Article Full Text: http://www.employmentlawtoday.com/articleview/26880-waiver-against-lawsuit-not-enforceable-for-worker-without-workers-compensation-coverage#sthash.B44EveId.dpuf

HR Canadian Reporter
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Feb 8, 2016

# Public sector employers can't arbitrarily decide what is workplace violence: Court

***They have obligation to investigate using impartial, competent individuals***

By Liz Foster

When it comes to workplace violence, public sector employers don't have the right to arbitrarily decide what constitutes such violence — they have an obligation to investigate using an impartial, competent person, according to the Federal Court of Appeal.

"Absent a situation where it is plain and obvious that the allegations fall outside the scope of the definition of workplace violence, the employer must appoint a 'competent person' to investigate when the matter cannot be resolved with the employee," said Justice Yves de Montigny in his decision.

**Background**

The court's Nov. 30 decision involved a workplace violence complaint filed in 2011 by Abel Akon, a poultry inspector for the Canadian Food Inspection Agency (CFIA) in Saskatchewan and member of the Public Service Alliance of Canada (PSAC). Akon alleged he was harassed, belittled and humiliated by his supervisor.

He said the conduct included "dismissive hand gestures, eye rolling, verbally demeaning behaviour, disregarding complaints regarding other employees yelling at him in front of plant personnel, lack of transparency and unfair marking of a certification exam."

The CFIA assigned a manager to do a fact-finding review of Akon's complaint and the investigations concluded there was no evidence of harassment. But Akon told a federal health and safety officer the CFIA manager was not sufficiently impartial to conduct the investigation.

So the officer directed the CFIA to appoint an impartial person to investigate, as required under the Canada Labour Code.

The CFIA appealed that direction to the Occupational Health and Safety Tribunal Canada, which found the CFIA acted appropriately when it dismissed Akon's complaint.

The appeals officer said the allegations did not constitute workplace violence because the conduct of Akon's supervisor's could not reasonably be expected to cause harm, illness or injury.

The tribunal's finding was then appealed to the Federal Court, with PSAC arguing the harassment Akon experienced could constitute workplace violence.

**Investigations important**

In the end, the court said “an unfettered discretion given to employers to determine whether a complaint warrants an investigation by a competent person” is at odds with the Canada Occupational Health and Safety Regulations.

“The appeals officer’s conclusion that an employer is entitled to review a complaint to determine whether it meets the definition of workplace violence was unreasonable,” said Montigny.

“Allowing the employers to conduct their own investigations into complaints of workplace violence and to reach their own determination as to whether such complaints deserve to be investigated by a competent person would make a mockery of the regulatory scheme and effectively nullify the employees’ right to an impartial investigation of their complaints with a view to preventing further instances of violence.

” A significant number of public service employees consistently report they have experienced harassment at work, said Lisa Addario, legal counsel for PSAC.

“An employee is entitled to an investigation by someone who is not invested in the outcome because of their position within an organization or their affiliation with the employer, and who is knowledgeable about the dynamics of workplace violence and its potential to adversely impact an employee.

” The Federal Court of Appeal also confirmed that “workplace violence may encompass harassment, and that psychological harassment can reasonably be expected to cause harm or illness in some circumstances.”

The ruling confirms what the PSAC has been saying all along — that harassment is part of the violence spectrum and has to be looked at like that and investigated appropriately, said Bob Kingston, president of the Agriculture Union, an affiliate of PSAC.

By recognizing psychological harassment as an aspect of workplace violence, employers are better equipped to protect workers, he said.

“When you try to separate them into totally different redress mechanisms and with different rights under each system, you end up spending all of your time arguing whether it’s harassment or violence instead of investigating and resolving the issue.”

**Impact on employers**

The requirement that a competent person conduct the investigation into complaints of workplace violence, which can include complaints of harassment, does concern employers, said Adrian Miedema, partner at Dentons Canada in Toronto.

“The question that will come out of this is: Will employers — when they have to engage a competent person — will many of them be forced to go outside of the company? Some employers may not be able to get agreement from the union or employees on an internal person, and they may have to go outside and have an outside investigator do these investigations, which obviously adds an additional cost.”

Mitigating these concerns is the fact the Federal Court of Appeal's decision did not impose requirements for the investigations themselves said Miedema.

"It doesn't say the investigator has to spend three days investigating, or two days," he said. "It says you have to have a competent person conduct an investigation. In some cases, that competent person may look at the allegations and say, fairly quickly, 'Those allegations don't make out a proper case of workplace violence.' I wouldn't say this imposes a really significant burden on employers."

While some see this decision as groundbreaking, Miedema predicted the ruling will have little effect on the day-to-day operations of federal employers.

"Employees, if they really want to get the case investigated in a thorough manner, because of the very broad definition of workplace violence, might be motivated to allege workplace violence (rather than harassment) and then the employer has to look at it and as long as it meets the very low threshold, they have to conduct an impartial investigation," he said.

But it's doubtful the court's decision will result in any significant increase in workplace violence complaints, said Miedema

"I would be very surprised if this decision were seen to result in a significant increase in workplace violence complaints.

" Moving forward, the decision will be significant in guiding federal employers to address the issue of harassment and workplace violence in a more meaningful way, said Miedema.

"This will get people actually dealing with the issue," he said. "The general awareness and changing attitudes about mental health in the workplace will take a while but I'd rather be working on that than still fighting over definitions."

Article Full Text: http://www.hrreporter.com/articleview/26723-public-sector-employers-cant-arbitrarilydecide-what-is-workplace-violence-court#sthash.tSZKP8Iz.dpuf

# News

## Moves

- **Janet Bobechko** has joined the Toronto office of *Norton Rose Fulbright* as a partner. She was previously at Blaney McMurtry LLP where she chaired the environmental group. She has a particular focus on environmental compliance and regulatory approvals. She provides environmental advice on all manner of business and real estate transactions.
- *Clark Wilson* announced that **Jim Schmidt** and **Scott Lamb** are now partners with the firm. Schmidt practises in the business litigation group and handles high-value commercial cases in trials, appeals and arbitrations and has particular experience in fraud claims, shareholder litigation and real estate disputes. Lamb practises in the technology, intellectual property and infrastructure, construction & procurement groups. Lamb is also a registered trademark agent and handles privacy law matters.
- *Aird & Berlis LLP* has announced the newest members of its expanded intellectual property practice. **Tim Lowman** and **Paula Bremner** have joined Aird & Berlis' litigation group and intellectual property group. Lowman has more than 35 years' experience as counsel in a broad range of commercial and intellectual property litigation. Bremner specializes in pharmaceutical patent litigation and trademark opposition matters. Five registered patent agents have also joined the firm's newly-founded patent agency practice: **Lola Bartoszewicz**, **Kimberly McManus**, **Kitt Sinden**, **Erica Lowthers** and **SuMei Cheung**.
- **Monika Szabo** is joining *PwC Law LLP*'s immigration practice as a partner in U.S. immigration law. She comes from KMPG Law LLP where she led the U.S. immigration department.

# Broader scope to sex harassment law

**DONALEE MOULTON**

Ontario is poised to enact new legislation that will substantively increase employer obligations relating to sexual harassment in the workplace.

Under the proposed new act, employers will have to take active steps to prevent and investigate incidents of sexual harassment.

"This is a comprehensive piece of legislation," said Sarah Crossley, a partner with Norton Rose Fulbright in Toronto. "It reinforces the importance of employers to take allegations of harassment very seriously. They cannot afford to turn a blind eye."

As a first step, Bill 132, *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)*, will require employers to update existing policies and procedures to clearly set out how incidents will be investigated, including how workers register a complaint if an employer or supervisor is the alleged harasser.

"Employers will have to spend time and resources to update their resources," said Sabrina Serino, an associate with Dentons employment and labour group in Toronto.

The legislation will have an even greater impact on publicly-funded colleges and universities and private career colleges, which will be required to create stand-alone policies addressing sexual violence against students, noted Nadine Zacks, an associate with Hicks Morley in Toronto.

"Implementing new effective policies and ensuring that all employees are trained on the policies is a large undertaking for any employer, and in particular smaller employers with less resources to spend on such projects," she said.

The main thrust of Bill 132, which amends several existing pieces of legislation including the *Occupational Health and Safety Act,* is to make it mandatory for employers to investigate complaints of harassment. It imposes a duty to ensure that incidents and complaints are appropriately investigated.

> This is a comprehensive piece of legislation. It reinforces the importance of employers to take allegations of harassment very seriously. They cannot afford to turn a blind eye.
>
> **Sarah Crossley**
> Norton Rose Fulbright

For some complaints such as employee-on-employee harassment, the investigation can be internal. For manager-on-employee complaints, the investigation will have to be external.

"Workplace harassment investigation requires a specific investigative skill set. Most small employers lack these skills and will likely have to retain consultants to do this," noted Daniel Zacks, an associate with Clyde & Co. Canada LLP in Toronto. These external investigations can be very expensive, he added.

"This will be costly and difficult for small employers."

Investigations can also be imposed on employers. A new legislative requirement will give Ministry of Labour inspectors greater authority to address complaints brought forward to them.

"As the bill now stands, it says inspectors can order third-party investigations, but it doesn't delineate how that will be determined," Serino noted.

In addition, the legislation, which has now passed second reading, will remove the limitation period for all civil proceedings based on sexual assault so victims can bring their civil claims forward whenever they feel ready to do so. The limitation period for survivors of sexual and domestic violence to make compensation applications to the Criminal Injuries Compensation Board will also be eliminated.

As well, the new legislation includes proposed amendments to the *Limitations Act, 2002* that describes what constitutes an intimate relationship. This could be problematic, said Daniel Zacks.

"The category of people in an intimate relationship that involves financial, emotional, physical, or other dependence is very broad.

"Unless 'dependence' is given a narrow meaning, it's a category that could in theory include every romantic relationship. This gives rise to the potential of significant volume of claims that are not subject to any limitation period."

Workplace harassment is also redefined under Bill 132 to include "workplace sexual harassment," which encompasses a course of "vexatious comment or conduct" and someone in a position of power "making a sexual solicitation or advance."

However, the legislation also makes it clear that a "reasonable action" taken by an employer or supervisor does not constitute sexual harassment. For example, denying an employee request for a day off is not harassment if the employer requires the worker on that day to maintain the business.

The new legislation flows from the Ontario government's aim to address issues of sexual harassment as spelled out in an action plan titled *It's Never Okay*, released in the spring of 2015.

According to the 35-page report, 28 per cent of Canadians say they have been on the receiving end of unwelcome sexual advances, requests for sexual favours or sexually charged talk while on the job.

Ontario's new legislation may also have a wider reach.

"This could definitely influence provinces across the country," said Serino. "Make no mistake, this is an important issue for employers and employees."

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## Bill 132: Ontario's new sexual violence and harassment legislation

***New legislation amends OHSA, redefines harassment and puts more obligations on employers***

By Sabrina Serino

The Ontario Government recently introduced Bill 132, An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters as a response to the Government's "It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment" policy statement announced earlier this year.

Bill 132 will amend various existing statutes with respect to sexual violence, sexual harassment, and domestic violence. For employers, important changes will stem from Bill 132's proposed amendments to the Occupational Health and Safety Act (OHSA), which include modifying the current definition of "workplace harassment" and imposing additional obligations on employers concerning their workplace harassment policies, programs and investigations.

Under Bill 132, the OHSA's definition of "workplace harassment" will be expanded to include "workplace sexual harassment", which is defined as:

1. Engaging in a course of vexatious comment or conduct against a worker in a workplace 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

2. Making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

Notably, Bill 132 also clarifies that a reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment.

Bill 132 will require an employer's program to implement a workplace harassment policy under s. 32.06(2) of the OHSA to further set out:

· Measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser;

· How incidents or complaints of workplace harassment will be investigated and dealt with;

· That information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless the disclosure is necessary for the investigation or corrective action, or is required by law; and

· How a worker who has allegedly experienced workplace harassment and the alleged harasser (if he or she is a worker of the employer) will be informed of the results of the investigation and of any corrective action taken.

An employer will be required to renew its program at least annually and provide its workers with appropriate information and instruction on the contents of both the policy and program.

When faced with a “workplace harassment” incident or complaint, under Bill 132 an employer will be required to ensure that an appropriate investigation is conducted and that both the worker who has allegedly experienced harassment and the alleged harasser (if he is a worker of the employer) are informed of the results and of any corrective action that has been, or will be, taken. Notably, Bill 132 will allow an inspector to order an employer to have an investigation and report completed by an impartial third-party, at the employer’s expense.

Bill 132 passed first reading on Oct. 27, 2015. If passed, the provisions of Bill 132 relating to the OHSA will come into force either six months after receiving Royal Assent or on July 1, 2016, whichever is the later date.

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Article Full Text: http://www.employmentlawtoday.com/articleview/26061-bill-132-ontarios-new-sexual-violence-and-harassment-legislation#sthash.hZ5Kd4ZT.dpuf

LEGAL ALERT

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Current Legal Developments Critical to Corporate Management

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***In law a man is guilty when he violates the rights of others. In ethics he is guilty if he only thinks of doing so.***

**~ Immanuel Kant (1724 – 1804)**

SECURITIES

# Proposed filing of private placement documents on SEDAR

**Paul Franco**, *Doris Law Office*

**Proposed amendments would facilitate private placement filings for reporting issuers but be burdensome for non-reporting issuers.**

On June 30, 2015, the members of the Canadian Securities Administrators (the "CSA"), other than the Ontario Securities Commission and the British Columbia Securities Commission (the "Participating Jurisdictions"), published for comment proposed amendments to National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)* ("NI 13-101") and Multilateral Instrument 13-102 *System Fees for SEDAR and NRD* (the "Proposed Amendments").

## Proposed requirement

The Proposed Amendments would require that the following documents, used in connection with a private placement, be filed electronically on SEDAR in the Participating Jurisdictions:

- Form 45-106F1 *Report of Exempt Distribution* ("Form 45-106F1");
- The offering memorandum and any other document, such as financial statements or marketing material, that may be required in the future to be filed or delivered under s. 2.9 (the

***See Securities, page 58***

EMPLOYMENT LAW

# Lessons on use of fixed-term employment contracts

**Andy Pushalik,** *Dentons Canada LLP*

**Employers notifying fixed-term employees that their employment contracts will not be renewed should not implement any employment changes that could be construed as a constructive dismissal.**

Employers will often try to give themselves greater flexibility with their workforce by using fixed-term employment contracts. While fixed-term employment contracts can be helpful in planning a company's labour supply, two recent cases show the issues that can arise on termination if employers do not properly implement these contracts.

## Facts

The primary benefit to a fixed-term employment contract is that it allows an

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# Securities *continued from page 58*

agents include law firms, financial printers, trust companies that act as transfer agents and registrars, and other service providers.

## Subscriber requirements

To become a SEDAR subscriber, a non-reporting issuer would need to:

- Download and become familiar with the SEDAR Information Package;
- Complete and sign SEDAR Form 1 – *Application for SEDAR Filing Services*;
- Sign SEDAR Form 2 – *Filing Service Subscriber's Agreement*;
- Return SEDAR Form 1 and Form 2 to the SEDAR Filing Service Contractor; and
- Download and install the SEDAR desktop client software.

### *Fee*

In addition, since most private placement filings require the issuer to pay a fee in each jurisdiction for the securities sold in that jurisdiction, the fee would have to be paid electronically through SEDAR using an electronic data interchange account (an "EDI Account"). A non-reporting issuer would need to either retain a filing agent to pay the fee on its behalf or it would need to open an EDI Account.

### *Education*

A non-reporting issuer who chooses to become a SEDAR subscriber and make its own filings would need to invest the time to learn how to use the SEDAR system. For non-reporting issuers that anticipate making only a limited number of SEDAR filings, it will likely be more efficient to hire a filing agent. So, if adopted, the Proposed Amendments would impose a significant burden on non-reporting issuers.

## Access levels

Form 45-106F1 is divided into two sections: the body of the report, which is generally public information, and Schedule 1, which includes personal information about each investor in the private placement, which is generally confidential information. To ensure that the information in Schedule 1 is generally kept confidential, the issuer will need to detach Schedule 1 from the body of Form 45-106F1 and file it with a separate access level that allows it to remain private.

SEDAR documents can be set to one of the following access levels:

- Auto-public – becomes automatically public within 15 minutes of filing on SEDAR;
- Private – initially private, but if or when the securities commission marks it public, it will display on SEDAR; and
- Private non-public – will remain private and will never display on SEDAR.

## Proposed access levels

Under the Proposed Amendments, private placement filings will have the following access levels on SEDAR:

- Form 45-106F1, excluding Schedule 1 – Auto-public;
- Schedule 1 to Form 45-106F1 – Private non-public;
- Offering memorandum – Auto -public;
- Disclosure document (s. 37.2 of Québec *Securities Regulation*) – Private; and
- Offering document, distribution materials, financial statements and notices (crowdfunding exemptions) – Private.

## Significance

If adopted, the Proposed Amendments will generally make private placement filings easier for reporting issuers. However, they will represent a significant new requirement and burden for non-reporting issuers.

# Employment Law *continued from page 57*

employer to employ an individual for a specific period of time and avoid any liability when the contract expires. This was certainly the goal in the case of *Thompson v. Cardel Homes Limited Partnership*.

Cardel Homes Limited Partnership ("Cardel") entered into a 12-month contract with one of its executives. Under the terms of the contract, Cardel could terminate the executive's employment at any time without cause by providing the executive with a lump sum payment equal to 12 months of the executive's salary.

### *Notice*

One month before the end of the contract's term, Cardel advised the executive in writing that it would not be renewing the contract. The letter went on to state that the executive would not be required to report for work for the remainder of the term, although Cardel would continue to pay the executive's salary.

The letter also demanded that the executive immediately return his office keys and his computer password. In addition, the company took steps to immediately revoke the executive's email access and transfer all of the executive's duties to the President & CEO.

### *Termination claim*

The executive disagreed with the company's position that his contract had expired and, instead, argued that his employment had been terminated. As a

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result, the executive sued for the 12-month severance payment contemplated by the contract.

At trial, the judge concluded that the company had not simply notified the executive that his contract would not be renewed; rather, it had terminated the executive's employment without cause by way of constructive dismissal.

### *Court of Appeal*

The Court of Appeal agreed. In a unanimous decision, the Court of Appeal stated that "...the employer's letter and its actions, viewed objectively, constituted a termination." If the employer simply wanted to notify the executive that the fixed-term contract was not going to be renewed, the letter should have been limited to that message.

However, by instructing the executive to return all company property and advising him that his duties would be assumed by the company's President & CEO, the employer had constructively dismissed the executive. As a result, the executive was entitled to the 12-month severance payment.

## Additional case law

The issue of an employee's entitlements on termination was also the issue in the case of *Howard v. Benson Group*. In that case, the employer terminated the employment of a manager during the second year of a five-year, fixed-term contract. In so doing, the employer relied on a termination provision.

That provision purported to allow the employer to terminate the employee's employment at any time "...and any amounts paid to the employee shall be paid in accordance with the Employment Standards Act of Ontario." The employee commenced a wrongful dismissal action, arguing that the termination clause was ambiguous.

### *Motion for summary judgment*

The employee also claimed that the clause in question violated the employment standards legislation since it did not provide for the continuation of the employee's benefits during the statutory notice period. On a motion for summary judgment, the judge agreed that the termination provision was not enforceable.

Accordingly, the employee was entitled to a greater amount of notice. However, in a departure from the case law to date, the judge disagreed with the employee's contention that he was entitled to be paid his salary for the remainder of the fixed term.

In the judge's view, the parties had clearly contemplated the early termination of the contract. As such, the appropriate measure of damages was to provide the employee with reasonable notice of termination based on the traditional factors.

## Lessons for employers

These cases provide some important guidance to employers regarding the termination of fixed-term employment contracts. First and foremost, employers should ensure that the termination provision of any employment contract is carefully reviewed so as to eliminate the risk of an unenforceable provision which triggers an unanticipated increase in damages.

Second, when notifying an employee that his/her employment contract will not be renewed, employers should avoid implementing any changes to the employee's employment that could be construed as a constructive dismissal. To minimize the risk of so doing, the employee should be permitted to work through to the end of his/her employment contract (unless the employee consents otherwise).

Lastly, the court's approach to assessing damages for fixed-term employment contracts based on an assessment of the reasonable notice period, rather than on the unexpired portion of the contract, is welcome news for employers; however, given the novelty of this approach in *Howard v. Benson Group*, employers should closely monitor the case law for subsequent interpretations of this case.

REFERENCES: *Thompson v. Cardel Homes Limited Partnership*, 2014 ABCA 242, 2014 CarswellAlta 1240 (*sub nom.* Thompson v. Cardel Homes LP) (Alta. C.A.) at para. 15; *Howard v. Benson Group*, 2015 ONSC 2638, 2015 CarswellOnt 5699 (Ont. S.C.J.) at para. 9.

**BUSINESS IMMIGRATION**

# Express Entry Application Management System introduced

**Kevin Beigel,** *Barrister and Solicitor*

**The introduction of the Express Entry Application Management System marks the dawn of a new era in the processing of permanent residence in Canada.**

## Express entry system

The arrival of the Express Entry Application Management System ("Express Entry") in 2015 marked the dawning of a new era in the processing of permanent residence in Canada. The bases for the Express Entry are the *Ministerial Instructions Respecting the Express Entry System* that were implemented on November 28, 2014 and the corresponding amendments to the *Immigration and Refugee Protection Act* and accompanying *Regulations*.

Gone are the days when an applicant who met the basic eligibility criteria for the Federal Skilled Worker ("FSWP"), Canadian Experience Class ("CEC") or Federal Skilled

***See Business Immigration, page 61***

  