

Recent Trends in Employment Law

SABA ZIA

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Agenda

1. New Mandatory Safety Awareness Training Requirement in Ontario
2. Update on cases dealing with Bill 168 (Workplace Violence and Harassment Prevention)
3. What's new in human rights law?
 - a) Recent Damage Awards by the Human Rights Tribunal of Ontario
 - b) New test for accommodating family status
4. Wrongful Dismissal: Updates on reasonable notice periods

New Mandatory Safety Awareness Training Requirement in Ontario

- Requirement to train workers and supervisors in “basic occupational health and safety awareness” – including workers in non-hazardous jobs
- Effective on July 1, 2014
- 2 types of training:
 - Workers
 - Supervisors
- Methods: e-learning modules or face-to-face training
- Resources available on Ministry of Labour website, including e-learning modules for supervisors and workers
- See Dentons’ Blog for more information:
<http://www.occupationalhealthandsafetylaw.com/>

New Mandatory Safety Awareness Training Requirement in Ontario

- Training for Workers must cover:
 - the duties and rights of workers under OHSA
 - the duties of employers and supervisors under OHSA
 - common workplace hazards and occupational illnesses
 - the role of joint health and safety committees (JHSCs) and of health and safety representatives under OHSA
 - roles of the ministry, Workplace Safety and Insurance Board (WSIB), and Health and Safety Associations, and
 - information and instruction requirements set out in the Workplace Hazardous Materials Information System (WHMIS) Regulation

New Mandatory Safety Awareness Training Requirement in Ontario

- Training for Supervisors must cover:
 - the duties and rights of workers under OHSA
 - the duties of employers and supervisors under OHSA
 - how to identify, assess and manage workplace hazards, the role of joint health and safety committees (JHSCs), and of health and safety representatives under OHSA
 - roles of the ministry, Workplace Safety and Insurance Board (WSIB), and Health and Safety Associations, and
 - sources of information on occupational health and safety

New Mandatory Safety Awareness Training Requirement in Ontario

- Employer may use own equivalent materials provided that materials cover the same content
- Exceptions from training requirements, include if worker or supervisor have received prior training covering the required content and have proof of training
- Maintain record of proof of training of workers and supervisors for up to 6 months
- Penalties for Non-Compliance:
 - Initial reminders to comply
 - Continued non-compliance may result in issuance of compliance order, charges or fines

Bill 168: Update on Workplace Violence and Harassment Prevention

- Law introduced June 15, 2010
- Ministry of Labour Statistics: 400 Complaints; 600 Orders; 1000 more investigations
- Requirements include establishing policies and programs; and providing information and instruction on such policies and programs
- Requirement to have complaint process
- Requirement to prevent workplace violence – not harassment

Bill 168: Update on Workplace Violence and Harassment Prevention

- Ontario Labour Relations Board (“OLRB”) responsible for adjudicating complaints made under OHSA
- The OLRB’s jurisdiction is limited to ensuring that:
 - Required policies and programs in place, including complaint procedure in place to deal with harassment and workplace violence complaints
 - “Information and instruction” is provided on such policies and programs
 - Employers take reasonable steps to prevent workplace violence
 - Employers do not reprimand against employees who complain about or attempt to enforce the above requirements

Bill 168: Update on Workplace Violence and Harassment Prevention

- Recent decisions from OLRB suggest that the Board also has jurisdiction to hear allegations of reprisal against employees who filed internal harassment complaints with employer:
 - *Ljuboja v. Aim Group Inc.*, 2013 CarswellOnt 16566
 - *Murphy v. The Carpenters' District Council of Ontario*, 2014 CarswellOnt 862
- Both cases involve dismissal of employees who previously filed harassment complaints against their superiors
- May see a significant influx of reprisal complaints being filed with the OLRB

Human Rights Law: Trends in Damages Awarded by Tribunal

- No cap on general damages since 2008
- Damages awards in typical cases range from \$500 to \$15,000
- Damages awards in exceptional cases (i.e. involving sex discrimination, termination of employment and/or multiple grounds of discrimination) range from \$25,000 to \$40,000
- 2012 Ontario Human Rights Review Report recommends significant increase in general damages awards

Human Rights Law: Trends in Damages Awarded by Tribunal

- *Fair v. Hamilton-Wentworth District School Board*, 2013 HRTO 440 (CanLII)
 - Reinstatement
 - \$400,000 for 10 years of back-pay and benefits
 - \$30,000 in general damages (i.e. damages for injury to dignity, feelings and self-respect)
 - Decision appealed

Human Rights Law: New Test for Accommodating Family Status in Ontario

- Family status is a prohibited ground of discrimination under *Human Rights Code*
- “Family status” means the status of being in a parent and child relationship
- Two distinct approaches to determining whether an employee has been discriminated against on the basis of family status:
 1. Serious interference with a substantial parental duty – need to demonstrate something more than ordinary conflicts between work and parental obligations. (*Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, [2004] C.H.R.D. No. 33)
 2. Some differential impact on individual based on family status. (*Johnstone and Canadian Human Rights Commission v. Canada Border Services*, 2010 CHRT No. 20)

Human Rights Law: New Test for Accommodating Family Status in Ontario

- *Devaney v. ZRV Holdings Limited*, 2012 HRTO 1590 (CanLII)
 - Facts:
 - Employee was the principal-in-charge of a major hotel development and expected to be available “around the clock”
 - He was also caring for his ailing mother
 - In order to balance personal and professional obligations, he worked remotely and rarely reported to his office from 2005 to 2007
 - In 2007, employer repeatedly demanded that employee report to office from 8:30 AM to 5:00 PM
 - Employee refused and was dismissed

Human Rights Law: New Test for Accommodating Family Status in Ontario

- *Devaney v. ZRV Holdings Limited*, 2012 HRTO 1590 (CanLII)
 - Findings:
 - Employee must demonstrate that the accommodation measures requested are “required” as a result of the employee’s family obligations
 - If it is the employee’s “choice”, rather than actual family “responsibilities”, that preclude the employee from meeting his/her employment obligations, then a *prima facie* case of discrimination on the basis of family status will not be established
 - In this case, Tribunal found that at least some of the employee’s absences from work were required because he was the primary caregiver for his mother, whose medical condition was deteriorating

Human Rights Law: New Test for Accommodating Family Status in Ontario

- Lessons for Employers:
 - Engage employees in dialogue when presented with request to accommodate
 - Inquire whether the employee has made reasonable efforts to make alternative arrangements so that they may attend work during regular business hours
 - Determine whether request is preference-based or required

Wrongful Dismissal: Calculating Reasonable Notice

- 24 months of common law reasonable notice considered highest end of range
- Combination of age and length of service have resulted in damages awards for higher than 24 months
- *Abraham et al v. Sliwin et al*, 2012 ONSC 6295 (CanLII)
 - Cap of 24 months is not inappropriate – “indeed any maximum” is inappropriate
 - Court states that it may have awarded more than 24 months’ pay to employees who were 63 years of age or older and had at least 35 years of experience

Wrongful Dismissal: Calculating Reasonable Notice

- *Hussain v. Suzuki Canada*, 2011 CarswellOnt 12251
 - 36 year employee, almost 65 years of age
 - Court awarded 26 months' notice
- Lessons for Employers:
 - Include enforceable termination provisions in employment contracts
 - Have termination provisions reviewed on regular basis in order to ensure that they are compliant with employment legislation

Thank you

The logo for Dentons, featuring the word "DENTONS" in white, uppercase letters inside a purple arrow-shaped box pointing to the right.

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