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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

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Developments in Workplace Injury Reporting: The Obligation to Report a Critical Injury of a *Non-Worker*

Last year's Ontario Labour Relations Board ("Board") decision against Blue Mountain Resorts Limited was a wake-up call for Ontario workplaces. The Board upheld Orders by a Ministry of Labour ("Ministry") Inspector against the Resort for failing to report the death of one of its *guests*.

Despite the passage of a year since the Board's decision, many Ontario workplaces are still largely unaware of the far reaching impact this decision has on their reporting obligations under the *Occupational Health and Safety Act ("OHSA")*. Indeed, the decision may have far reaching implications for workplaces across Canada.

What Happened at Blue Mountain?

On December 24, 2007 a guest at the Resort was found dead in the indoor swimming pool. The pool was not supervised at the time and no Resort employees were present. When the guest was found, the Resort assumed he died of a heart attack. It was later learned he drowned.

The Resort did not report the death to the Ministry for three reasons: (i) the Resort believed the reporting obligation under s. 51(1) of the *OHSA* did not apply to an incident where a *non-worker* was injured in the course of a *recreational activity*; (ii) the Resort did not believe it had an obligation to report an injury (or the death) of *any* non-worker; and (iii) the Resort believed the death resulted from natural causes and did not consider its swimming pool to be a *workplace*.

The Ministry disagreed on every point, issuing an Order against the Resort for failing to notify an Inspector of the drowning death and failing to provide first aid and other reports following the incident. The Resort appealed the Orders to the Board.

The Two Key Issues Before the Ontario Labour Relations Board

1. Does s. 51(1) of the *OHSA* require an employer to notify the Ministry where a critical injury is suffered by a "non-worker"?
2. Is a location a "workplace" even when there are no workers present?

The Board's Decision

The Board held that the term "person" in s.51(1) of the *OHSA* should be interpreted broadly and not restricted to a worker. According to the

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Board, if the Ontario legislature intended the reporting requirement to apply only to an injured *worker*, it would have clearly stated this. Instead, section 51(1) states:

> Where a **person** is killed or critically injured from any cause at a workplace, the constructor, if any, and the employer shall notify an inspector … and … within forty-eight hours after the occurrence, send to a director a written report of the circumstances of the occurrence containing such information and particulars as the regulations prescribe.

In answer to the second issue - is a location a "workplace" even when there are no workers present - the Board held that the term "workplace", which is defined in the *OHSA* as "*any land, premises, location or thing at, upon in or near which a worker works*", should not be restricted to only areas were workers are present at the time of the injury. The Board considered that the *OHSA* is remedial, public-welfare legislation intended to protect health and safety in the workplace generally. As such, "workplace" should be interpreted to include all areas in or near where workers perform work, regardless whether workers are present at the time an injury occurs.

Following the release of the Board's decision, the Resort brought an application for judicial review, which is still before the Courts. However, unless and until the Board's decision is overturned – and we do not expect that it will be overturned - a workplace must comply with the accident reporting obligations under the *OHSA*, regardless whether the individual injured is a worker and regardless how the injury occurred. This includes customers, clients and general members of the public.

Does This Reporting Obligation Apply Across Canada?

As a result of the Board's decision in *Blue Mountain*, employers across Canada should re-examine their health and safety and reporting practices to ensure compliance with the various provincial standards.

Some provinces require reporting of critical or serious injury sustained by *workers*, while others, like Ontario, include *non-workers*. In addition, each jurisdiction has its own definition of "critical" or "serious" injury, and requires the reporting of different information within different timeframes. For example, some provinces require an explanation of the cause of the incident, while others, such as Ontario, require only a description of the circumstances.

An organization that operates in multiple provinces should therefore ensure it has policies and procedures that comply with the requirements of each jurisdiction, and that managers and front line staff are aware of and trained to respond quickly and appropriately.

Best Practices - A 12 Step Critical Injury Checklist

In the event of a critical injury, consider the following 12 Step Checklist to help guide you through the process. Remember, reporting requirements differ from province to province. Employers operating in more than one jurisdiction should seek out and understand the legal obligations in each province. Generally speaking, in the event of a critical or serious injury:

1. **Provide Medical Assistance:** Immediately call for appropriate medical aid.
2. **Preserve The Scene:** Other than to preserve life or prevent unnecessary damage to equipment or other property, do not move equipment or material before the provincial labour regulator arrives and/or releases the scene.
3. **Determine Whether Reporting is Required:** Does the injury meet the criteria for a critical or serious injury, and if so is a report to the provincial labour regulator required?
4. **Contact Your Lawyer:** Call your labour/employment lawyer who will guide you through steps to protect your organization's legal rights, including how to contact the provincial labour regulator, prepare required reports, respond to the accident investigation and conduct an internal investigation (if appropriate).
5. **Notify Others Of Incident:** If the injury meets provincial requirements for notification, immediately contact the provincial labour inspector as well as the workplace's Joint Health and Safety Committee and trade union (if applicable).
6. **Gather Factual Information:** Identify and record factual circumstances of the incident and injury. Record the full names, telephone numbers and addresses of witnesses and persons providing first aid. People move and/or change jobs and you may need to know how to contact these witnesses in the future. Take photographs, measurements and record site conditions.
7. **Co-operate With Provincial Labour Investigation:** Co-operation is required by law. However, it is advisable, to the extent possible, to ensure that a representative of the workplace accompany the provincial labour investigator to record questions asked, answers given and documents produced (copy these). Where necessary, correct misinformation. During this process it may be prudent to have the assistance of your lawyer.
8. **Complete Required Reports:** Prepare reports containing information required by the provincial labour regulator and submit them within the specified timeframe (*i.e.*, 48 hours for Ontario). Where required, provide copies of reports to the Joint Health and Safety Committee. Your lawyer can assist you to meet these obligations.
9. **Conduct Your Own Investigation:** As soon as possible after the incident, it may be appropriate for a representative of the workplace to conduct an internal investigation. This includes interviewing witnesses regarding: their observations of the incident; training and knowledge of workplace hazards and rules and warnings. During this process it is prudent to have the assistance of your lawyer.
10. **Protect Results of Internal Investigation:** There are important steps – externally and internally – that should be taken to protect internal investigation notes and reports from disclosure to the provincial labour regulator. Merely including the words "privileged and confidential" may not be sufficient. Your lawyer will assist you to take the appropriate steps.

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No *General* Duty To Protect Emotional Wellbeing of Employee During the Course of Employment

With the emergence and coming into force of Bill 168 - the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)* 2009 - provincially regulated employers in Ontario have become aware of their obligation to create and maintain a safer workplace free from violence and harassment.

Some employee advocates have argued that it flows naturally from these new, statutory obligations that an employer is under a general duty to protect an employee during the entire course of employment from acts in the workplace that might cause mental suffering. However, a recent decision of the Ontario Court of Appeal – *Persferriera v. Bell Mobility and Ayotte ("Bell Mobility")* – tells us differently.

Bell Mobility - What Happened?

Bell Mobility is a story of a conflict that emerged between an employee, described by her co-workers as "nervous and sensitive", and her manager, described by the Court as "critical, demanding, loud and aggressive". As the Court pointed out, "The two personalities could hardly be less complementary".

Matters between the two came to a head after the employee failed to arrange a meeting with a client and the manager criticized her for failing to do her job. Following a verbal altercation in which the employee held her Blackberry up to the manager's face, the manager pushed her on her shoulder, throwing her back into a filing cabinet.

The employee lodged a formal complaint with Bell Mobility's HR department and after looking into the incident HR censured the manager, disciplined him and asked him to attend a course on "effective communication". HR also attempted to arrange a meeting to allow the manager to apologize to the employee. However, the employee declined to attend and at that point Bell Mobility considered the matter closed.

The employee never returned to work. Instead, she commenced litigation against the manager and Bell Mobility.

A Win For The Employee At Trial

The trial was a resounding success for the employee. The trial judge found that she had been wrongfully dismissed, but more significantly, found liability in tort against the manager and Bell Mobility. The manager was liable for the torts of battery and intentional infliction of mental suffering. Bell Mobility was liable for negligent infliction of mental suffering as well as vicariously liable for the torts of the manager.

As a result of being successful on the tort claims, the employee was entitled to a more expansive damage assessment – including her lost income until retirement. All in all, the employee was successful to the tune of more than $600,000 plus costs in the amount of a further $225,000. Bell Mobility appealed.

The Ontario Court of Appeal Weighs In

The two central questions on appeal were: (i) can an employer be liable in tort for *negligent* infliction of mental distress; and (ii) on these facts, did the manager's conduct constitute an *intentional* infliction of mental distress.

The Ontario Court of Appeal allowed the appeal on both fronts. For our purposes, the Court's most important finding was that an employer does not have a *general* duty of care to protect an employee's emotional wellbeing during the course of employment.

In reaching this conclusion, the Court acknowledged that an employer already has a duty to shield an employee from mental suffering at the time of *termination* (a particularly sensitive time) through the application of the *Wallace* principles However, to impose a broader duty of care that extends over the entire employment relationship would, in the Court's opinion, be "undesirable … because it would be a considerable intrusion by the courts into the workplace [and] has a real potential to constrain efforts to achieve efficiencies". The Court also held that, on the facts of this case, *intentional* infliction of mental distress had not been made out.

> An employer does not have a *general* duty of care to protect an employee's emotional wellbeing during the course of employment.

In the end, what remained was the tort of battery, and the wrongful dismissal and moral damages awards. After a reassessment of these amounts, the Court reduced these awards from more than $600,000 to approximately $125,000.

Lessons Learned

In *Bell Mobility*, employers dodged a bullet that had potential to extend an employer's common law liability to employees in a manner not yet seen.

Instead, the Court of Appeal said, in effect, that an employee wronged in the midst of an employment relationship has an option: he or she may either stay the course, or sue and claim damages for constructive dismissal and if appropriate for *intentional* infliction of mental distress and/or bad faith in the manner of dismissal (*Wallace* damages). However, the idea that there exists a free-standing, *general* duty of care for an employee's emotional wellbeing throughout the duration of the employment relationship does not exist.

One final note: As of the time of writing this article, the plaintiff in *Bell Mobility* had sought leave to appeal to the Supreme Court of Canada. We will keep our readers apprised of any developments

To learn more please contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

By 2012, it will be an offence under the *Workplace Safety and Insurance Act* to hire a contractor or subcontractor to perform construction work without the contractor or sub-contractor having a valid WSIB clearance certificate. Employers could be liable for unpaid premiums and prosecuted. Individuals could be fined up to $25,000 and/or imprisoned for up to six months. The maximum fine for a corporation is $100,000.

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11. **Obtain Independent Expert Advice:** Depending on the nature of the incident, as soon as possible thereafter, discuss with your lawyer the benefit of retaining an expert to comment on the conditions that existed at the time of the accident. This may include an engineer, health and safety consultant, *etc*.
12. **Take Preventative Steps:** To minimize the risk of future injury consider undertaking a workplace health and safety audit including a review of health and safety policies, practices, training, inspection schedules, *etc*. Implement and document preventative steps identified in the review. In addition to protecting workers, these steps may reduce whatever penalty is ordered against the workplace and/or management.

To learn more or for assistance please contact a member of Sherrard Kuzz LLP.

HReview
Seminar Series

Please join us at our next HReview Breakfast Seminar:

Accessibility for Ontarians with Disabilities Act

This new law requires provincially regulated employers to comply with the requirements of a variety of training and *Accessibility Standards* - beyond the existing accommodation requirements in the *Ontario Human Rights Code*. Failure to comply may result in an administrative fine of up to $100,000. Public sector employers must be in full compliance by January 1, 2010; and private sector employers by January 1, 2012.

At this *HR*eview Seminar attendees will learn:

1. **What is a *Customer Service Accessibility Standard*?**
2. **The nuts and bolts of the policies and programs employers must have in place to comply with the Act.**
3. **The training employers must provide to employers under the Act's regulations.**

DATE: **Tuesday September 21, 2010; 7:30 – 9:30 a.m.** (Program at 8:00 a.m. - breakfast provided.)

VENUE: Mississauga Convention Centre, 75 Derry Road, Mississauga, Ontario L5W 1G3 905.564.1920

COST: **Please be our guest.**

RSVP: By Monday September 13, 2010, to info@sherrardkuzz.com or 416.603.0700

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