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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Responding to a claim of harassment in the workplace presents challenges for even the most well-intentioned employer...

The good news is that with proactive training of HR managers and employees, as well as the application of best practices, risk can be reduced or even avoided.

Court Cheesed Off at Kraft's Non-enforcement of Workplace Policies

Even before the recent introduction of anti-harassment provisions into the Ontario *Employment Standards Act* (headlined in our June, 2010 newsletter), many employers had official policies in place to protect against workplace harassment. However, in a July decision of the Superior Court of Justice, Kraft Canada learned that it may be one thing to have policies but quite another to apply and enforce them.

The Facts

Douglas Disotell was an equipment operator at a Kraft cheese factory, employed since 1990. At one point, Mr. Disotell became involved in a sexual encounter which included the ex-wife of his supervisor. In the fall of 2003, while at a bar with a friend, Mr. Disotell indiscreetly discussed this encounter. Word leaked back to his workplace and Mr. Disotell was reprimanded. But the reprimand was only the first consequence. Mr. Disotell's revelation led to four co-workers making numerous, uninvited derogatory comments, which continued for nearly 2 ½ years. Mr. Disotell became upset and complained several times to his new supervisor, who in fact had witnessed a number of these incidents himself.

Kraft's zero-tolerance workplace harassment policy ("the Policy") required employees to deal with each other respectfully and prohibited workplace harassment. It included procedures for reporting incidents to a manager and to Kraft's Human Resources department ("HR"). But the supervisor was dismissive of Mr. Disotell's complaints, and on one occasion, discouraged Mr. Disotell from reporting the incidents to HR.

Matters came to a head when Mr. Disotell left the workplace in May 2006 due to depression, and eventually received LTD benefits. Only after he left did HR learn of the allegations, and as required by the Policy, an internal investigation was launched.

HR's investigation was cursory. Mr. Disotell's supervisor and three other supervisors were interviewed. Mr. Disotell's supervisor claimed he had received only a single complaint from Mr. Disotell one month before his sick leave commenced, and as a result, had verbally reprimanded two of the perpetrators. HR did not ask who the perpetrators were, nor did it ask what the allegations were. At that point, HR closed its investigation.

HR later defended its conduct, saying that it did not delve deeper because the supervisor was experienced and knowledgeable and there was no reason to doubt the results of his investigation. Had more questions been asked, HR would very likely have realized that the supervisor had done nothing by way of investigation or fact gathering.

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HR also faulted Mr. Disotell for not escalating his complaint to HR or his manager, as required by the Policy. However, this criticism of Mr. Disotell lacked consistency, because HR was oblivious that Mr. Disotell's supervisor had himself breached the Policy by failing to report the matter.

Months after Mr. Disotell left the workplace he retained counsel who wrote to Kraft to complain about the harassment. In his letter, Mr. Disotell's counsel offered considerably more detail including names and summaries of the harassment. Kraft rejected an offer by Mr. Disotell's counsel for a meeting to provide more details of the harassment, and performed no further investigation. Mr. Disotell later filed suit for constructive dismissal.

The Court's Decision

Regarding Kraft's investigation, the judge was not impressed, stating that it:

> "...demonstrates the inherent difficulty of in-house investigations between employees of longstanding relationships, especially when there are conflicting reports between supervisory and first level employees. Kraft has clearly invested much time and effort in creating and disseminating a zero tolerance harassment policy. That policy however is only as effective as the individuals who administer it."

The judge found serious deficiencies in Kraft's internal human resources investigation:

> Faced with the serious and repetitive allegations made by the Plaintiff against four named employees and given the knowledge of one substantiated complaint that two of the named individuals had committed conduct sufficiently serious that a supervisor verbally reprimanded them, the conduct or conclusions of H.R. were not "neutral". All the facts were "not in", as none of the four alleged perpetrators or other floor employees were interviewed as is clearly contemplated in [the Policy's] reference to "both parties", namely the harasser and the harassee."

The judge held that Mr. Disotell's employment had been constructively terminated, stating:

> "a reasonable person in the same position as Mr. Disotell faced with the length of time during which harassment [sic] comments were being made and the severity thereof, would conclude that the term of his employment by which the employer was required to provide an environment free of harassment had been changed by the employer allowing the harassment to continue."

Mr. Disotell was awarded 12 months' notice which, after reduction on account of income earned in subsequent employment, came to $34,000.

Lessons Learned

Responding to a claim of harassment in the workplace presents challenges for even the most well-intentioned employer. Investigating complaints thoroughly and fairly is always the objective. A poorly executed investigation can lead to monetary damages being assessed against the employer as well as undermine workplace morale. The good news is that with proactive training of HR managers and employees, as well as the application of best practices, risk can be reduced or even avoided. Consider the following:

1. **Proactive Training.** Even before a complaint is lodged, managers and employees should be trained in, and comfortable with, the steps that must be taken in response to a complaint of workplace harassment. This includes an understanding of prevailing harassment laws, as well as the workplace's own, internal policies regarding reporting and investigation. In the case of Kraft Canada, the judge found that while a Policy did exist, it was insufficiently followed. Experienced legal counsel can assist to design and implement training tailored to each specific workplace. Workplaces that wait to carry out training until after a complaint is received will have waited too long.
2. **Once A Complaint Is Received.** If a harassment complaint is received, consult with counsel as early as possible to obtain specific advice in relation to the circumstances at hand and how to best protect the workplace. Remember - any situation can end up in litigation, so remain mindful of whether steps taken in response to a complaint are likely to stand up to judicial scrutiny. Issues to address include:
   - Whether an internal investigation is feasible or whether it would be preferable to retain an outside investigator.
   - Effective interviewing of witnesses
   - The importance of remaining neutral
   - Proper note-taking
   - How to maintain confidentiality of the internal report
   - Appropriate discipline, if any
   - How and when to communicate the outcome of the investigation to the parties involved

For assistance designing a Harassment-Free Workplace Policy, and training managers and employees, contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

In an effort to eliminate the Ministry of Labour's backlog of more than 14,000 employment standards complaints, the Government of Ontario has proposed several amendments to the *Employment Standards Act, 2000 ("ESA")*, including requiring employees to inform employers of *ESA* complaints before the Ministry will commence an investigation; and granting authority to Employment Standards Officers to settle complaints.

To learn more contact Sherrard Kuzz LLP

Costco Experiences Frustration with Judge's Generous Returns Policy

Many employers have encountered challenges arising from an employee's extended absence from work due to health reasons. A recent case illustrates the pitfalls for employers who attempt to prematurely bring matters to a head by terminating employment.

The Facts

Just short of 12 years into his clerical employment with Costco, Frank Naccarato became disabled in July, 2002, and was unable to continue attending at work. This absence continued four years, during which Mr. Naccarato received short term and then long term disability benefits. In 2006, Costco cut off Mr. Naccarato's other group benefits, but he continued to receive disability benefits. At the beginning of January, 2007, Costco made inquiries of Mr. Naccarato's family physician. The questions and responses were as follows:

Q: "Please provide basic details about Frank's current treatment plan (i.e. medication, referral to specialist, test results etc.) and progress.

A: *"...Mr. Naccarato is still very depressed and poor function at home. ... Effexor ..., Remeron ..., Zyprexa ...*

"Patient was seen Dr. Paul - psychiatrist weekly who depart since ... Nov. 2006. ***I am try to find another psychiatrist for him to see ... for further treatment"***

Q: "Please provide a specific estimate of the duration of Frank's continuing absence and an approximate return to work date."

A: *"At the present condition I can't predict when Mr. Naccarato will be able return to his job."*

The Law

It has been a longstanding rule in employment law that an absence due to illness or disability is permissible, without triggering an automatic right on the part of an employer to summarily terminate employment. Originally, health-related absence from work was considered to be a right which was implied by judges into the employment relationship. With the modern day enactment of human rights legislation, absence from work due to disability has become a statutorily protected right.

However, it has always been an accepted tenet that at some point, a prolonged absence from work becomes too substantial to impose a continued obligation on an employer to keep an employee's job open. That point is known in law as "frustration". If an employment relationship is deemed frustrated, that brings the relationship to an end, with an employer's responsibility being limited to payment of the amount prescribed under employment standards legislation.

The Facts - *Continued*

Costco concluded from the doctor's answers that the time had come when Costco could consider the employment relationship to have been legally frustrated, so it notified Mr. Naccarato and paid out his statutory entitlement. In making this decision, Costco believed it had the highest authority on its side, based on a Supreme Court of Canada decision which contained the following statement: *"... The employer's duty to accommodate [a medically based absence from work] ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future."*

Costco relied on the portion of the doctor's note which said that he was unable to predict when Mr. Naccarato would be able to return to work. Costco emphasized the following factors:

1. The lengthy absence of five years.
2. In order to continue to receive disability benefits, Mr. Naccarato had taken the position that he was totally disabled from performing work in any occupation.
3. The doctor's statement that he did not know when Mr. Naccarato would improve.

Mr. Naccarato did not accept Costco's decision, and sued for wrongful dismissal. Unfortunately for Costco, the trial judge agreed with Mr. Naccarato.

If an employment relationship is deemed frustrated, that brings the relationship to an end, with an employer's responsibility being limited to payment of the amount prescribed under employment standards legislation.

The Court's Decision

On the facts before it, the Court found Mr. Naccarrato's absence of nearly five years (perhaps as long as any absence ever judicially sanctioned in a wrongful dismissal claim) did not constitute frustration. The reason, the Court held, was as follows:

1. The legal burden of proof rested with Costco.
2. That part of the doctor's note which stated he was trying to find another psychiatrist to work with Mr. Naccarato at least suggested a possibility that Mr. Naccarato's condition would improve.
3. In light of the foregoing note, Costco ought to have followed up with the doctor(s) to request a statement of probability as to whether Mr. Naccarato would ever return to work.
4. Costco's business requirements and workplace policies confirmed its recognition that employees could be off work and receiving disability benefits for lengthy periods of time.
5. Costco had not led evidence to demonstrate that it had incurred or would continue to incur costs by leaving Mr. Naccarato on its books as an employee.

In the result, the judge allowed Mr. Nacaratto's wrongful dismissal claim and awarded him 10 months' pay in *lieu* of notice (with a credit for statutory payments already received).

Lessons Learned

There are several important lessons to be learned from the Court's decision in Costco.

When an employee has been off work for an extended period of time due to a health-related issue and receiving benefits, and a possible termination of employment is being contemplated, consider the following before taking any action:

It is important that a well-developed medical record be assembled. Ambiguities or incomplete medical notes or reports are likely to be resolved in favour of the employee. If an employee's physician is unable or unwilling to provide a sufficiently conclusive response, consider obtaining a medical report from an independent physician.

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An employer should review whether it has a policy limiting the amount of time the employer will continue to maintain its premium payments. Even if there is no policy, it may be permissible to discontinue premium contributions after an extended absence. An experienced employment lawyer will be able to help an employer work through the analysis.

Even if an employer does not currently have an employee absent for health reasons, it is prudent to take proactive steps to create and implement a policy limiting the amount of time the employer will continue to maintain its premium payments. By having a policy in place proactively, an employer will have put itself in a stronger position (should the need arise) to argue the decision to cease premium payments was neither biased nor capricious. Rather, the decision could be justified as one taken in the ordinary course of business and consistently applied to all affected employees.

Finally, when an employee is off work for an extended period of time due to health reasons, whether or not receiving disability benefits, an employer should ask itself whether taking action to terminate the employment of the employee, is truly necessary to satisfy the employer's business imperatives. If the employee's absence is not materially affecting the employer, there may not even be a problem which needs fixing.

For assistance designing and implementing a disability policy for your workplace, please contact a member of Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Employment Law Update

1. **Human Rights:** How are courts interpreting human rights issues?
2. **Employment Contracts:** Practical tips for drafting enforceable employment contracts. The latest view from the bench.
3. **Mental Distress Damages:** What type of conduct will cost you more?
4. **Restrictive Covenants:** An employee's obligations post-employment.

DATE: **Tuesday November 16, 2010; 7:30 – 9:30 a.m.** (Program at 8:00 a.m. - breakfast provided.)

VENUE: Hilton Garden Inn Toronto-Vaughan, 3201 Highway 7 West, Vaughan, Ontario L4K 5Z7

COST: **Please be our guest.**

RSVP: By Friday November 5, 2010, to info@sherrardkuzz.com or 416.603.0700

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SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

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