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SHERRARD KUZZ LLP
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Workplace Violence and Company Sponsored Sports Teams – Traps and Tips

Does an employer's obligation to take all reasonable precautions to protect workers from workplace violence extend to company sports teams that play off-site in independently-run leagues?

Few would question an employer has a responsibility to protect its workers from violence or harassment in the workplace. However, the scope of this responsibility is less clear when workers are off the clock, participating in a voluntary, off-site, company-related sporting event. In this case, can physical force on the playing field constitute "workplace violence?" Does it matter if the physical force is the result of an intentional act, or in the normal course of playing the sport?

These questions have yet to be determined by a court or tribunal. However, depending on the degree of involvement of the employer in the sporting event, physical force, even unintentional force, may be found to fall within the definition of "workplace violence," triggering employer liability.

Ontario employers in particular ought to consider their legal responsibilities before rallying the staff to reach for their sneakers. This is because Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) 2009*, came into force on June 15, 2010. It requires all provincially-regulated employers in Ontario to protect workers against violence and harassment in the workplace.

What is "workplace violence"?

"Workplace violence" is defined in Ontario's act to include:

- The exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury.
- An attempt to exercise physical force against a worker in a workplace that could cause physical injury.
- A statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force against the *worker*, in a *workplace*, that could cause physical injury.

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The Ontario Ministry of Labour has also stated that "workplace violence" need not be intentional.

Is a player a "worker"; is the playing field a "workplace"?

"Worker" is defined as a person who is paid to perform work or supply services. "Workplace" is any land, premises, location or thing at, upon, in or near which a worker works. According to Ontario's Ministry of Labour, if the worker is being directed and paid to be at or near a particular location, the location is a workplace.

On the basis of these definitions, consider the following factors when examining whether a player is a "worker" and the playing field a "workplace":

- Are employees expected and not just encouraged to participate?
- Are employees paid to participate?
- Is the sports activity under the care and control (directly or indirectly) of the employer?
- Are games or practices held during work time?

If the answer to some or all of these questions is 'yes', an employer may be responsible to protect its workers from 'violence and harassment' in the course of playing the sport.

Can An Employer Protect Itself and Its Employees?

For some employers a bit of risk may be a reasonable price for the benefits of having a company sports team. However, the risk of harm to workers — and the employer's own liability — may be limited by seeking to structure participation so that players are not considered "workers" and the playing field is not considered a "workplace." Even if this can be accomplished, though, there is no guarantee the Ministry of Labour will agree.

If an employer chooses to sponsor or support a company team and the sporting activity is organized and run independent of the employer, consider the following steps to help minimize risk:

- Participation should be voluntary and for recreational purposes.
- Workers should not be paid or receive any form of remuneration or benefit arising from participation.
- Practices and team meetings should not take place on the employer's premises or company time.
- A workplace violence and harassment policy should be in place, in compliance with prevailing legislation. This must be preceded by a risk assessment to measure the risk of violence, and followed up with programs and procedures to implement the policy, ideally with the advice of legal counsel.
- Workers participating in the sporting event should understand and appreciate they are not permitted to engage in acts of violence and harassment, and appropriate behaviour is mandatory.
- Risk of violence and injury is almost always enhanced when alcohol is involved. Either prohibit consumption of alcohol at the event, or ensure the organizers limit consumption responsibly.
- Prior to participation in the sporting activity, each worker should be required to formally, in writing, release the employer from liability in the event an incident or injury occurs.
- The employer should inquire into the type and scope of insurance coverage the league or organizer has in place to protect participants; and also consult with its own insurance broker to ensure appropriate coverage.
- A written, workplace policy, regarding all of the above, should be in place and 'signed-off' by workers in advance of participation.

For assistance preparing your team to take to the field, contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

In response to public outcry, the Government of Canada recently announced that effective January 1, 2011 employment insurance premiums will be scaled back from a proposed increase of 15 cents to 5 cents per $100 of insurable earnings.

To learn more, contact a member of the Sherrard Kuzz LLP team.

Human Rights Matters: They Ain't Over Till They're Over

Two recent decisions of the Ontario Human Rights Tribunal (the "Human Rights Tribunal") have given employers reason to re-examine the approach they may be taking to workplace accommodation.

Background

Prior to 2008 amendments to the *Ontario Human Rights Code* (the "*Code*"), a Respondent to a human rights application (typically an employer) could ask the Human Rights Tribunal to not 'deal with' a complaint because the application '*could be adequately dealt with in another forum.*' Practically speaking, this arose in situations where the issue being raised in the application was also being dealt with under another regime, such as at the Workplace Safety and Insurance Board (the "WSIB") or at labour arbitration (where arbitrators are not only entitled, but obliged, to interpret and apply legislation such as the *Code*).

The 2008 amendments to the *Code* changed this. At present, the Human Rights Tribunal will <u>only</u> dismiss an application where '*it is of the opinion that another proceeding has appropriately dealt with the substance of the application*'.

During the Government's consultation process, even before the amendments were passed, this particular amendment garnered considerable debate. What was the meaning of the phrase "dealt with appropriately", and how would "the substance of the application" be determined? *Legally*, the amendment appeared to open the door to the Human Rights Tribunal reassessing the approach taken by other tribunals to address a human rights issue. *Practically speaking*, it could mean the litigation of a human rights complaint might not be over even when perhaps it should.

Two Recent Decisions

We now have two decisions that provide some insight into the meaning of the 2008 amendment to the *Code*; and the picture painted isn't helpful to employers.

The first case is *Boyce v. Toronto Community Housing Corporation Corp.* In this case an employee suffered a work related injury. The employer assigned him alternate work but he declined on the basis that travel requirements were not acceptable to him. The WSIB Claims Adjudicator found the alternate work to be suitable, and discontinued benefits. The employee appealed and a WSIB Appeals Resolution Officer granted the appeal, in part, awarding five (5) months of benefits.

Despite his partial victory, the employee filed an application with the Human Rights Tribunal alleging, under the *Code*, that his employer failed to accommodate him to the point of undue hardship. The Tribunal agreed.

The Human Rights Tribunal looked at the *Code* and *Workplace Safety and Insurance Act* (the "*WSIA*") and concluded <u>both</u> pieces of legislation had jurisdiction over the matter; the *WSIA* because the purpose of the legislation was the return to work of injured workers, and the *Code* because any work related injury is considered a 'disability' under the *Code*.

However, in the circumstances of the specific case, the Human Rights Tribunal found the WSIB considered only whether the employer offered 'suitable modified work' under its early and safe return to work obligations. The WSIB did not consider whether the employer fulfilled its re-employment obligation which required the employer to accommodate *to the point of undue hardship*; a higher standard also applied under the *Code*.

Against this backdrop, the Human Rights Tribunal concluded the employer had not adequately considered the employee's request to be moved to another location and as such had not sought to accommodate the employee to the point of undue hardship.

In another recent decision, *Barker v. Service Employees International Union*, the employee was terminated following an absence due to medical reasons. The matter went to arbitration, where the termination was upheld. The arbitrator found the medical evidence provided by the employee failed to show she was likely to be able to return to work in the foreseeable future, with or without accommodation.

The employee also filed an application with the Human Rights Tribunal; and the employer sought to have the application dismissed on the basis that '*another proceeding* [the arbitration] *had appropriately dealt with the substance of the application*.'

> In light of the 2008 amendments to the *Code*, a human rights matter might not be over unless and until it is adjudicated by the Human Rights Tribunal

The Human Rights Tribunal considered the *Code's* amended test to dismiss an application; and concluded that the Tribunal was required to '*scrutinize the human rights analysis of other decision makers*' in rendering its own decision. On this basis, the Human Rights Tribunal concluded the arbitrator had not adequately considered the appropriate sections of the *Code*, and sent the matter to a full hearing.

Lessons Learned

These two decisions demonstrate in fact what many of us had feared in theory; in light of the 2008 amendments to the *Code*, a human rights matter might not be over unless and until it is adjudicated by the Human Rights Tribunal.

All of which suggests the following practice tips:

- Be aware of all legislation that may affect the steps you take as an employer to accommodate an employee's disability.
- The provision of suitable work is the *minimum* requirement to accommodate a workplace injury under the *WSIA*. However, meeting this standard will not necessarily shield an employer from a human rights application.

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- Before concluding under the *WSIA* that suitable work is not available, or an employee cannot return to work in the foreseeable future, consider whether the employer has explored every accommodation option to the point of undue hardship.
- Keep a record of all accommodation efforts, regardless whether the issue has been dealt with in another forum.
- Before terminating an employee for failure to accept suitable work (as in *Boyce*) or for an inability to return to work in the foreseeable future (as in *Barker*), consider whether it is in the employer's best interest to offer a package in exchange for a full and final release against any and all future claims.

To learn more, or for assistance with human rights and related matters, contact a member of the Sherrard Kuzz LLP team.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Ontario's New Human Rights Regime: The Experience So Far

Effective June 30, 2008, the Ontario government made significant amendments to the Province's human rights regime. Intended to make the system more effective and efficient, changes were made to the structure of the *Human Rights Code* as well as the timing and method of holding hearings.

In this *HR*eview Breakfast Seminar we will review the employer experience under the new regime, including:

1. **What has been the *practical* experience of employers?**
2. **What are the first steps an employer should take when it receives a human rights application?**
3. **How does a labour arbitration or other proceeding, such as a Workplace Safety & Insurance proceeding, impact a human rights application?**
4. **What procedural avenues are available to assist an employer to deal with an application?**

DATE: **Wednesday January 19, 2011; 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 January 7, 2011, to info@sherrardkuzz.com or 416.603.0700

HRPAO CHRP designated members should inquire at www.hrpao.org for certification eligibility guidelines regarding this *HReview Seminar*.

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