MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Are You Ready For Summer Employees?

As thousands of eager students take up their summer jobs, it is important for employers to know which provincial and federal laws may govern this summer employment relationship.

Which Laws Apply?

Some statutes apply equally to employees who are hired for the summer and those who are longer-term. For example, the *Ontario Human Rights Code* and *Canada Human Rights Act* make no distinction between permanent full-time employees and summer employees. Similarly, neither the *Occupational Health and Safety Act* nor the *Occupational Health and Safety Part* of the *Canada Labour Code* exempt part-time or summer employees from their protections. Indeed, every employer is encouraged to take special care with summer employees, who may have little or no workplace experience, to ensure they are properly trained in all workplace safety measures.

Which Laws May Not Apply

The *Employment Standards Act* (Ontario) ("*ESA*"), which governs the basic terms of the employment relationship for provincially regulated employers in Ontario, sets out some exemptions for positions likely to be filled by summer employees. For example:

1. How old is the employee? Summer students below 18 years of age are not protected by minimum wage provisions.
2. Is the summer employment for a specific term or task? If so, no notice of termination or termination pay is required.[1]
3. In what business is the employer engaged? Certain businesses are exempt from minimum wage, overtime and holiday provisions of the *ESA*. For example, co-op programs supervised by a secondary school college or university; supervision of children at a camp or in a recreational program; landscaping or swimming pool installation or maintenance; and road building.
4. What is the summer employee's occupation? Some occupations are exempt from public holiday provisions. For example, the hospitality industry, among others.

[1] Employees hired for a definite term or specific task and employees who have been employed for less than three months are not entitled to notice of termination or termination pay. However, we advise our clients to nevertheless require every employee to sign a contract specifying the term or task for which they are being employed and confirming that they are not entitled to notice of termination or termination pay under the *ESA*.

If you think your workplace may fit within one of these exemptions please contact a member of our team.

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An Employee's Duty To Mitigate:
What An Employer Can Do To Help Itself

As the number of layoffs and terminations increases so does the number of wrongful dismissal claims. Given the current state of the economy it is important for an employer to do everything possible to minimize exposure to, and the potential financial liability that may flow from, a wrongful dismissal claim.

Many employers know that even post-termination a departing employee continues to owe certain obligations to his or her former employer. One obligation is the duty to mitigate the damages that may arise as a result of the termination; that is, an employee must take reasonable steps to find a comparable position so as to minimize the loss, if any, suffered as a result of the termination. This includes: a) actively pursuing reasonably comparable employment, and b) being available for work.

The question we are often asked is: "Is the employer required to *actively assist* the employee to take reasonable steps to mitigate? If so, what must an employer do?"

Recent Case Law

In four recent decisions[1] the courts closely scrutinized the actions of an employer that argued that a former employee failed to take reasonable steps to mitigate. In each of the cases the judge dismissed the employer's argument, and found that the employee had taken reasonable steps to mitigate. In almost every instance the judge noted the following:

1. The employer had not offered the employee assistance to find a replacement job (*i.e.*, job replacement counselling).
2. Despite a prompt request for a reference letter the employer did not provide a reference until considerably later (in one case, a letter of reference was not provided until shortly before the trial - approximately nine months after the termination).

The question we are often asked is: "Is the employer required to actively assist the employee to take reasonable steps to mitigate? If so, what must an employer do?"

Job Replacement Counselling

While courts have acknowledged that an employer has no legal obligation to provide job replacement assistance to a departing employee, the fact that this type of assistance is offered is relevant. Specifically, the cases suggest that the standard to which an employee is held when assessing whether he or she has done everything reasonable to find comparable reemployment is influenced by the outside resources made available to that employee. In other words, although there is no legal obligation on an employer to do so, courts nevertheless take into consideration whether the employer has offered job replacement assistance.

For this reason (in addition to others mentioned below) we advise our clients to provide departing employees with the option of job replacement counselling even if a termination package is not accepted. Another compelling reason is the fact that most employees do benefit from this type of counselling increasing the likelihood that they will mitigate their loss sooner than they otherwise might. As well, job replacement counselling can benefit an employer's image in a courtroom. Offering this service may be seen as evidence that the employer has acted fairly and reasonably. Conversely, if an employee refuses to accept an offer of re-employment counselling, this may be seen as evidence that the employee has failed to act reasonably.

Reference Letter

In circumstances where an employee has been let go without cause, the timely provision of a reference letter should be seriously considered. The court was critical in each of the cases in which the employer did not move with reasonable diligence to provide a reference letter to the former employee. In one case, the evidence at trial was that a seven month delay in providing a reference letter was due to a realignment of responsibilities and lines of communication at the employer's head office. Still, the judge was unsatisfied:

> …It is clear to me that the failure of [the employer] to provide its dismissed employees with timely letters of reference is systemic in nature. Whether it results from a deliberate management decision, or simply sloppy HR practices, I cannot tell on the evidence before me….

In some cases, a positive reference, where deserved, will help to maximize mitigation. It may also help to minimize employee animosity and the desire to commence or continue litigation.

Some employers may hesitate to provide a reference letter out of fear that a future employer may sue based on a claim of misrepresentation. However, so long as the employee has not committed misconduct or been dishonest, we are not aware of any successful lawsuit which has been decided on this basis.

If an employer is unwilling to provide a positive reference letter, or is concerned about the risks associated with providing a reference letter, a compromise might be to provide a neutral reference, often referred to as an "employment letter". A neutral reference is a description of the employee's dates of employment with the employer, the position most recently held by the employee and the duties and responsibilities of that position.

A Check List

As mentioned at the outset, given the current state of the economy it is important for an employer to do everything possible to minimize the liability associated with an employee termination. By considering this checklist, an employer can improve its position should it be necessary to assert that a former employee has failed to take reasonable steps to mitigate.

If the termination is without cause:

1. At the time of termination, in writing, advise the employee that, upon request, a reference letter is available.
2. Once requested, provide the reference letter in a timely manner.

[1] *Yiu v. Canac Kitchens Ltd.* (February 23, 2009), *Aucoin v. Liturgical Publications of Canada Ltd.* (February 24, 2009), *Zaman v. Canac Kitchens Ltd.* (February 25, 2009), and *Corso v NEBS Business Products Ltd.* (March 17, 2009).

"An Employee's Duty.." continued from page 2

3. At a minimum, provide a neutral reference letter and ensure that if a prospective employer calls to discuss the reference, comments provided remain consistent with the content of the letter.

OR

4. Provide a positive reference letter if it is deserved and it is reasonable in all the circumstances to do so.
5. Consider offering re-employment counselling, whether or not the employee accepts a termination package. This will demonstrate good faith on the part of the employer and enhance the employer's mitigation argument should the employee fail to make use of the services offered.

Even where the employee has been terminated for cause, there may be reason to consider offering job replacement counselling and a neutral reference letter. Should the employee commence a lawsuit there is never a guarantee that a court will uphold the employer's "cause" defence, and it is prudent to have a fallback strategy. However, be sure that nothing contained in the letter undermines the argument that the employee's employment was terminated for cause.

To discuss this, and other ways to protect your workplace, please contact a member of our team.

Temporary Employment Agencies – Legislative Update

On May 4 2009, the McGuinty government passed *The Employment Standards Act (Temporary Help Agencies), 2009 ("ESA Temp")* which will become law as early as the end of this year. Under the new act, the government has identified temporary agency employees ("temps") as a group requiring greater statutory protections than exist under current law. The government has indicated its view that practices currently being followed by temp agencies create barriers to permanent employment.

Making Temps Permanent Employees

In order to enable a temp to more easily become a permanent employee, the *ESA Temp* prohibits the following practices:

- Utilizing a contractual provision which prevents an employer from directly hiring a temp
- Charging a fee or commission if a temp has worked at a business for six months or more and is ultimately hired by the employer

Both of these amendments will also benefit an employer that wishes to "try out" a particular temp, and then goes on to hire him or her on a permanent basis.

Fees Not To Be Charged To Temps

According to the government, charging a fee directly to a temp is "double-dipping" (because the employer is also charged a placement fee) and as such unfair. Accordingly, the *ESA Temp* prohibits a temp agency from collecting certain fees from temps. These include:

- A fee for accepting permanent employment with a client
- A fee for becoming a temporary worker
- A placement fee
- A fee for assistance preparing a resume or preparing for job interviews

Information Required to be Given to Temps

The identity and location of some temp agencies can sometimes appear unclear. Accordingly, each temp agency will be required to provide to a temp the following information:

- The agency's name and contact information
- An information sheet outlining employee rights under the *Employment Standards Act, 2000* (the *"ESA")*
- Written information such as wages and hours of work in respect of each temp assignment

One of the new amendments adds a twist... to an employer's disadvantage. The amendment permits a temp to utilize the anti-reprisal provisions of the ESA if the reason for not continuing to use the temp is a "reprisal" because the temp asserted a right under the ESA.

ESA Rights Extended

One of the advantages of hiring a temp is that he or she can be engaged without the need for an elaborate interview process and reference check, because a temp can be sent back to the agency if he/she proves to be unsatisfactory. Similarly, it is not uncommon for an employer to request of a temp agency that a particular temp not be assigned to that workplace in the future.

One of the new amendments adds a twist to the above scenario, to an employer's disadvantage. The amendment permits a temp to utilize the anti-reprisal provisions of the *ESA* if the reason for not continuing to use the temp is a "reprisal" because the temp asserted a right under the *ESA*. This is a potentially worrisome amendment. Even if entirely lacking in merit, it is a very simple process for an temp employee to file a reprisal complaint with the Ministry of Labour. Moreover, once filed the onus shifts to the employer to demonstrate that the reason for not continuing to use the temp was not a reprisal.

The amendments will come into effect within six months after receiving royal assent. We will keep our readers posted. In the interim, if you would like to discuss how any of these amendments may affect your business, please contact a member of our team.

DID YOU KNOW?

The Government of Ontario is proposing amendments to the *Occupational Health and Safety Act* to address workplace violence and harassment, including allowing workers to refuse to work where they believe they are in danger of workplace violence. To learn more, please join us at our *HR*eview Seminar on September 17, 2009 *(details below)*.

For more information please contact Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Workplace Harassment, Violence and Bullying: Rights, Responsibilities and How to Manage to Avoid Liability

1. **The Legislation – What are the rules?**
   - Health and Safety Legislation
   - Human Rights
   - "Psychological Harassment"
2. **Defining the Issue**
   - What constitutes harassment?
   - What factors do courts, arbitrators and administrative tribunals consider?
3. **Investigation and Response to Complaints of Harassment and Violence**
   - The framework for an appropriate response
   - Complaints under a Collective Agreement
4. **Discipline and Discharge**
   - Just Cause and proving the case
   - Underlying mental disability
   - Accommodation as a necessary response
5. **Prevention and Practical Tips to Avoid Liability**
   - Review and update current policies
   - Modify the workplace to create a safer environment

DATE: **Thursday September 17, 2009, 7:30 – 9:30 a.m.** (Program at 8:00 a.m. - breakfast provided.)

VENUE: **Eagles Nest Golf & Country Club,** 10,000 Dufferin Street, Maple, Ontario 905.417.2300

COST: Please be our guest

RSVP: By Friday September 4, 2009 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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