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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Hands Off! Ontario Bans Use of Electronic Devices While Driving

Electronic devices have become an integral part of most workplaces. So much so that it is difficult to imagine a day without them. Cellular phones, personal data devices and global positioning systems enable managers and workers to stay connected with each other, clients and suppliers.

Unfortunately, the use of electronic devices while operating a motor vehicle can create significant and deadly risk. An Australian study conducted in 2005 showed that motorists who use cell phones while driving are four times more likely to crash, causing serious injury to themselves and others. Another study, out of the University of Utah, concluded that talking on a cell phone while driving is as dangerous as driving while intoxicated.

Ontario's New Law

The Ontario legislature recently passed Bill 118, known as the *Countering Distracted Driving and Promoting Green Transportation Act, 2009* (the "*Act*"). Bill 118 is expected to become law in the Fall of 2009.

The *Act* prohibits driving a motor vehicle:

- While holding or using a hand-held wireless communication device that is capable of receiving or transmitting telephone communications, electronic data, mail or text messages (*i.e.*, Blackberry, *etc.*).
- While holding or using a hand-held electronic entertainment device or other device which is unrelated to the safe operation of a motor vehicle (*i.e.*, MP3 player, *etc.*).
- If the display screen of a television, computer or other device in the vehicle is visible to the driver (*i.e.*, laptop, DVD player, *etc.*).

The Exceptions

There are a few exceptions.

A driver may use a hand-held device: i) if the driver is using the device in hands-free mode (*i.e.*, Bluetooth); or ii) if the vehicle is off to the side of the road, or lawfully parked on the road, and is not impeding traffic.

In addition, a display screen may be visible to the driver if the device is:

- A global positioning navigation device.

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- A logistical transportation tracking system device for commercial purposes to track vehicle location, driver status or the delivery of packages or other goods.
- A device with the sole purpose of delivering a collision avoidance system.
- An instrument, gauge or system indicating the status of the motor vehicle's systems.

Finally, and not surprisingly, the prohibitions do not apply to a driver of an ambulance, fire department vehicle or police vehicle or to an individual using an electronic device to contact ambulance, fire or police emergency services.

It is not inconceivable that an employer may be held vicariously liable for a breach of the Act committed by an employee, and/or for damage arising out of a related motor vehicle accident

Penalty

A driver who breaches the *Act* may be charged under the *Highway Traffic Act*'s general penalty provisions, and if convicted, fined from $60 to $500. A driver convicted under the *Act* will not receive demerit points. However, the *careless driving* sections under the *Highway Traffic Act* continue to apply. A careless driving conviction can result in six demerit points, a fine of up to $1,000 and/or up to six months in jail.

Impact on Employers

A penalty under the *Act* is directed at the driver of a motor vehicle, not the driver's employer. However, it is not inconceivable that an employer may be held vicariously liable for a breach of the *Act* committed by an employee, and/or for damage arising out of a related motor vehicle accident. To date, no such case has been decided in Canada. However in the United States, employers have been sued as a result of car accidents caused by employees using mobile devices:

- In 1999, the investment banking firm Smith Barney was sued by the family of a motorcyclist who was killed by a Smith Barney employee who was talking on his cellular phone while driving. The company settled the lawsuit for $500,000.
- In 2000, Jane Wagner, a Virginia lawyer struck and killed a 15 year old girl with her car. The victim's family alleged that Wagner was speaking to a client at the time of the accident. Her employer, Cooley Godward, was held vicariously liable. Ms. Wagner was ordered by a jury to pay $2 million to the victim's family. She also forfeited her license to practice law and served one year in jail. Her employer, Cooley Godward, was also sued directly by the victim's family and settled for an undisclosed amount.

Get Your Workplace Ready

Old habits die hard, and there is little doubt that it will be difficult for some employees to break their habit of talking, reading and texting while driving. Some will continue to do so because it assists them to carry out their employment responsibilities (*i.e.*, communicating with clients, *etc.*), others because this is either expected or required by their employer, and still others out of sheer convenience.

Whatever the reason, as an employer it is important to take every reasonable step to lead your workforce toward compliance with the *Act*. Some ideas to consider:

- Educate employees about the purpose of the *Act* and the danger of distraction while driving.
- Create and enforce a workplace policy that clearly states that breaching the *Act* while in the course of employment (whether or not while using company technology) will not be tolerated and will be the subject of discipline up to and including dismissal for cause.
- If it is necessary or desirable that your employees have the benefit of an electronic device while driving, ensure the appropriate technology and training is in place for hands-free use in accordance with the *Act*.
- Lead by example.

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

DID YOU KNOW?

A high profile lawsuit filed by employees of CIBC seeking compensation for unpaid overtime work was dismissed when the Court found that the claims were too individualized to qualify as a class action. Each employee may still bring an individual lawsuit against the bank.

For more information please contact Sherrard Kuzz LLP.

Human Rights Tribunal Gives Teeth To Section 45.1 of the Code

In the Spring of 2008, the Province of Ontario dramatically amended its *Human Rights Code* (the "*Code*"). Among the amendments was the introduction of section 45.1 of the *Code* which permits the Human Right Tribunal of Ontario (the "Tribunal") to dismiss an application if the Tribunal "*is of the opinion that another proceeding has appropriately dealt with the substance of the application*."

The rationale behind section 45.1 is not novel in law or to the human rights system in Ontario. The principle that there should be finality in litigation and that a responding party should not be twice vexed for the same matter is embodied in the long-standing common law doctrine of *abuse of process*. Even prior to the amendments to the *Code* the Human Rights Commission (the "Commission") had the power to dismiss a complaint that had already been dealt with in another forum. However, the Commission is not an adjudicative body and does not produce published decisions. Accordingly, it is difficult to know the extent to, and circumstances within, which the Commission exercised this power.

With the enactment of section 45.1 it is hoped that the Tribunal will begin to create a body of jurisprudence that will better assist the public to understand how the principle of *abuse of process* will be applied to human rights complaints.

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Two Recent Decisions

Two recent decisions suggest the Tribunal may provide a broad interpretation to this new section of the *Code*.

In *Campbell (Litigation Guardian of) v. Toronto District School Board ("Campbell")* the Tribunal dismissed a human rights application filed by Jacqueline Lewis Campbell ("Ms. Campbell") on behalf of her autistic son on the basis that the substance of the application had been appropriately dealt with in another forum.

In 2003 the Independent Placement Review Committee (the "IPRC") with the Toronto District School Board (the "School Board") made the decision to transfer Ms. Campbell's son into a special education class. Ms. Campbell appealed this decision through a process established under the *Education Act* alleging that the School Board had not provided her son appropriate educational support.

Ms. Campbell was unsuccessful and, hoping to achieve a different result, commenced a human rights claim against the School Board. The human rights claim arose out of the same set of facts. The Commission on behalf of Ms. Campbell, argued that the issue considered under the *Education Act* was not the same as the issue before the Tribunal. Under the *Education Act* the issue was whether the placement decision made by the IPRC was appropriate for the student. Whereas the Tribunal's mandate was to employ human rights principles to determine whether the child had been accommodated to the point of the School Board's undue hardship.

The Tribunal considered both the principle of abuse of process and section 45.1.

With respect to the issue of abuse of process the Tribunal noted that the central purpose of the statutory scheme for special education is the accommodation of children with special needs. In pursuing this goal the principle consideration is the "best interest of the child". To this end, the hearing under the *Education Act* may not have employed a *Code*-based analysis or considered whether the child's disability had been accommodated to the point of undue hardship. However, the issue under consideration was essentially the same as it would have been under the *Code*; namely, what is required to accommodate the student with the disability in order to obtain equal treatment in the provision of educational services?

Turning to section 45.1, the Tribunal noted that the meaning of this section remains to be developed. However, one thing was clear: "*a decision about whether a matter has been dealt with "appropriately" does not require this Tribunal to be satisfied that it would have reached in the same conclusion as that reached in the other forum. Section 45.1 does not require the Tribunal to act like an appellate court.*" This is a significant statement, because it demonstrates deference on the part of the Tribunal toward other adjudicative bodies. Precisely how, and in what circumstances, this deference will be shown remains to be seen.

The case of *Dunn v. Sault Ste. Marie (City) ("Dunn")* provides another example of when the Tribunal may exercise its authority under section 45.1 of the *Code*. Darby Dunn ("Mr. Dunn") suffered a workplace injury that left him permanently disabled. Mr. Dunn, dissatisfied with the accommodation offered by his employer, asked his union to file a grievance on his behalf. The union refused to pursue the grievance and Mr. Dunn filed a duty of fair representation complaint with the Ontario Labour Relations Board (the "OLRB"). He alleged that the union had represented him in a manner that was "arbitrary, discriminatory and in bad faith."

Mr. Dunn settled his duty of fair representation complaint with the union and withdrew his application before the OLRB. Shortly thereafter he filed a human rights complaint alleging that the union discriminated against him on the basis of his disability by failing to advance his grievance.

Relying on section 45.1 of the *Code*, the Tribunal barred Mr. Dunn's complaint from proceeding. The Tribunal explained that "discrimination" in relation to a duty of fair representation complaint "*has been interpreted broadly to include all cases in which a trade union distinguishes between or treats members differently without cogent reason for doing so*". This is broader than "discrimination" under the *Code*, which only applies to discrimination on the basis of certain protected grounds. Accordingly, the question of whether Mr. Dunn's human rights were violated by the union could have been a live issue in his duty of fair representation complaint before the OLRB. The settlement of that complaint therefore barred Mr. Dunn from raising the same substantive allegations in a different forum.

This is a significant decision. The Tribunal found that: (a) a 'settlement' could qualify as 'dealing with' the substance of an application; (b) the OLRB has 'familiarity' with human rights issues, and, (c) if a human rights issue forms the basis of an applicant's complaint in another proceeding, it is not necessary that the disposition of that proceeding (*i.e.*, a settlement) expressly bar a subsequent human rights complaint. This may be inferred.

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Lessons Learned

Section 45.1 of the *Code* is still in its infancy, and it is too soon to draw sweeping conclusions from the Tribunal's decisions in *Campbell* and *Dunn*. Still, these decisions suggest that the Tribunal may be prepared to give to section 45.1 real and important meaning.

At the very least the Tribunal has demonstrated that the application of section 45.1 of the *Code* will prevail when the substance of a dispute *engages* principles of human rights law even if it does not squarely apply the *Code*. Further, the Tribunal has stated its reluctance to interfere or seek to substitute its own decision even where – had the matter been heard by the Tribunal - it may have reached a different result. These are important propositions.

We will follow these issues closely and keep our readers informed.

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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