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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

As you plan your workplace holiday festivities, be sure to plan for the safe arrival home of every guest

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Though 'Tis The Season To Be Jolly Reckless Partying Remains Pure Folly

Egg nog, latkas, old friends, new friends and a whole lot of beveraging! Believe it or not, the holiday season is just around the corner. On behalf of everyone at Sherrard Kuzz LLP let us be the first to wish you a safe and happy holiday!

We also want to remind you that as you plan your workplace holiday festivities, be sure to plan for the safe arrival home of every guest. For some time now it has been settled law that where a guest at a workplace event consumes alcohol, drives and injures or damages someone or something, including the guest him/self, the host employer may be held liable by the court any for damage that is caused. It is not enough for a representative of the host employer to merely discourage a guest from drinking and driving. Courts require more active intervention.

To protect your guests and others from harm, and your workplace from legal liability, consider the following best practices:

1. Ensure attendance at the party is voluntary.
2. Hire professional bartenders to serve alcohol; these people are trained to spot intoxicated revelers and how to handle them.
3. Provide non-alcoholic beverage options.
4. Avoid an 'open' bar; instead consider providing each guest with a limited number of drink tickets.
5. Ensure food (of substance; *i.e.*, not merely chips and pretzels) is served at all times alcohol is available.
6. Stop alcohol service two hours before ending the function.
7. Confront intoxicated guests immediately and cut them off; do not wait until they are ready to leave the party.
8. Do not inquire of the apparently impaired guest whether he/she thinks they are able to drive home; the worst person to ask for guidance in such a circumstance is the intoxicated person whose judgment is impaired; if you suspect someone is unable to drive do not allow them to do so.
9. Have a taxi chit available for every guest who requires one.
10. Call a friend or family member to pick up intoxicated guest.
11. Arrange for discounted rooms at the event location (if possible) or a nearby hotel.
12. Under no conditions should you or your team allow anyone who appears intoxicated to get behind a wheel; if necessary, contact police for assistance.
13. Contact your insurer to discuss appropriate insurance coverage for your event.

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

Happy holidays to all!

Employers Can Breathe Easier With Recent Sherrard Kuzz Decision

In a recent case argued by Sherrard Kuzz LLP, the Human Rights Tribunal of Ontario (the "Tribunal"), found that an employer did not discriminate against an employee who claimed that his bronchitis was caused by workplace fumes.

The Facts

The employee was hired by the employer to work in its used furniture refurbishment division. As part of his duties of employment, the employee was required to work with sprays and glues.

In April of 2008, the employee became ill and was absent from work. He had difficulty breathing, a cough, headache and chest pain. On April 14, 2008, he sought emergency medical attention and was diagnosed with bronchitis.

On April 15, 2008, the employee saw his family physician. It was the employee's evidence that he told his doctor about fumes, what he believed was poor ventilation at work, and that his illness was caused by the workplace conditions. Tellingly, his doctor's note reflected no information about workplace conditions at all:

> *This is to certify that [the employee] has been ill with bronchitis and unable to attend work since 14 April 08. He should be able to resume regular duties by 21 April 08.*

The employee provided the doctor's note to his supervisor. He then returned to work on April 21, 2008.

Prior to the Tribunal hearing, Sherrard Kuzz obtained an order compelling the employee to produce his physician's clinical notes and records. These records were also bereft of any suggestion that the bronchitis was connected to any workplace conditions.

The employee claimed that he made multiple complaints to his supervisors and to the Health and Safety Representative about chemical fumes he was inhaling. The employer acknowledged that one complaint had been made after the employee's return to work, but denied that there were any other complaints. The employer also denied that the employee ever indicated that fumes were related to his bronchitis.

The employee was terminated from his employment for poor work performance on May 1, 2008.

The Issue

At the Tribunal hearing, the employee argued that he suffered discrimination on the basis of a disability – namely, because he had complained that he had contracted bronchitis due to fumes in the workplace. As the case unfolded, the issues crystallized into the following:

1. Is bronchitis a disability under the *Human Rights Code* ('the Code")?
2. Was the employee's bronchitis a result of workplace fumes and chemical sensitivities?
3. Did the employer terminate the employee because of a real or perceived disability?

The Decision

The Tribunal found that the employee had not been discriminated against and dismissed the complaint.

First, the Tribunal confirmed that not all illnesses are a disability under the Code and "everyday illnesses" do not constitute a disability. This is useful for all employers who may receive accommodation requests for "temporary illnesses which are experienced by everyone from time to time" (*e.g.,* a cold). The broad obligation to accommodate a disability under human rights legislation is not required for everyday illnesses.

Second, the Tribunal found that the employee's bronchitis and nasal congestion were not proven to be caused by workplace conditions. This decision was based on the fact that the employee had failed to provide medical information which linked his bronchitis to exposure to fumes or chemicals. Further, the medical evidence produced to the Tribunal did not indicate any restrictions on the employee's exposure to chemicals.

The Tribunal went on to find that because the medical note that was given to the employer did not connect the employee's bronchitis to exposure to chemicals in the workplace, there was no reason for the employer to have perceived the employee to have any kind of chemical sensitivity. The employer believed, and the evidence supported, that the employee merely had a garden-variety bout of bronchitis, which is not a disability under the Code.

The Tribunal dismissed the complaint. As there was no real or perceived disability, the employee's termination of employment for poor work performance was not a breach of the Code.

Not all illnesses are a disability under the Code and "everyday illnesses" do not constitute a disability.

Lessons Learned

This decision highlights some useful tips for employers when encountering an accommodation request in the workplace. Specifically:

- Ensure that you have a policy in place that is consistently applied and clearly outlines the information that you expect your employees to provide to management in the event of an absence from the workplace.
- Remember, not every illness is a "disability". Transient illnesses (*i.e.*, a cold or bronchitis) are not considered a disability under the Code, and as such do not require Code-based accommodation.[1]
- In order for an employee to prove the existence of a disability it is not sufficient that the employee *allege* a link between a medical condition and workplace, environmental sensitivities. The employee must demonstrate - with evidence - the medical condition resulted from or was contributed to by the workplace environment.
- If a complaint is made about the workplace environment and its effect on an employee's health, consider investigating the complaint fully which may involve retaining technical or medical experts to provide advice.
- Where an employee does suffer from a disability make every effort to accommodate the employee short of undue hardship to the workplace.

[1] Under Ontario employment standards legislation, employers with 50 or more employees still have limited obligations to permit absences from work for ill employees, even for an everyday illness.

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

Death Knell Tolls For Employers' Use Of Descending Scope Restrictive Covenants

For years employers in many U.S. states have been able to rely upon the courts to enforce restrictive covenants whose provisions were found to be too far reaching, but which could be scaled down (*i.e.*, "blue pencilled") by the courts to something more reasonable in the circumstances. For a number of years in Canada the jury was out and many employers wondered whether they too could rely upon the courts to enforce a modified version of a restrictive covenant found by a court to be too broad.

The most recent word from the Supreme Court of Canada makes it clear that Canadian employers will not be able to rely on the courts for such assistance – employers need to get it right the first time. If not, the restrictive covenant may be declared unenforceable in its entirety creating the potential for considerable harm to the employer.

Shafron v KRG Insurance Brokers (Western) Inc.

In the decision *Shafron v KRG Insurance Brokers (Western) Inc ("Shafron")*, decided in January 2009, the Supreme Court of Canada reviewed the use of the U.S. style "blue-pencil" approach to restrictive covenants.

The blue-pencil approach involves a two-stage process: first, a court finds a part of the contract to be void; and second, the court modifies the offending part of the contract by either revising the language or adopting a lesser restriction that already exists in the contract.

In *Shafron* the Supreme Court considered a claim by a former employer to stop its former employee from taking employment within the "Metropolitan City of Vancouver".

The trial court in *Shafron* had made a factual finding that there was no generally recognized geographic area known as the "Metropolitan City of Vancouver". As such, the meaning of the word "Metropolitan" was ambiguous. The employer's submission was that if "Metropolitan" were found to be ambiguous, the word could be corrected through the application of the blue-pencil approach, resulting in the employee at least being unambiguously stopped from employment within the "City of Vancouver".

Generally speaking, the Supreme Court has rejected the application of blue-pencil approach in situations where employers are seeking to enforce overly-broad or ambiguous restrictive covenants. In the *Shafron* case, the Supreme Court therefore refused to revise the contractual wording.

When the Supreme Court makes a decision, all other courts across Canada are required to follow it. Unfortunately, it is often not entirely clear how lower courts will interpret and apply the broad principles expressed in Supreme Court decisions.

Now, more than ever it is imperative that the terms of a restrictive covenant be drafted carefully, reasonably and precisely. There is little room to wiggle. Employers must get it right the first time.

A Recent Case

Bonazza v Forensic Investigations Canada Inc. ("*Bonazza*"), a case decided in the Ontario Superior Court of Justice, appears to be the first Ontario decision to consider *Shafron*.

In *Bonazza*, the employer utilized what is referred to as a "descending scope restrictive covenant", which sought to prevent a former senior employee from competing for a period of two years within:

"(a) Ontario
(b) York, Durham, Halton, Peel and Toronto
(c) Mississauga
(d) 5 km radius from employer's Mississauga office."

Those familiar with the Greater Toronto Area will observe that the geographical area described in (a) takes in all of (b) and more, and the same applies for (b) as compared with (c), and so on.

Prior to *Shafron*, there was judicial precedent in which a court asked to deal with a descending scope restrictive covenant could select the largest geographic area considered to be reasonable, and declare void any larger area. As a result, employers found descending scope covenants to be an attractive strategy. Their use enabled an employer to choose the broadest geographic area, while avoiding the risk that if the scope was found to be too broad and therefore unenforceable, there was nothing left for the employer to enforce.

In *Bonazza*, the judge held that the descending scope restrictive covenant was ambiguous. In other words, it was not clear on its face within what area the employee was not supposed to compete. The judge explained that *Shafron* had fundamentally altered the availability of blue-pencil severance and that it "*sounds the death knell for descending scope restrictive covenants*".[1]

Lessons Learned

The Supreme Court's decision in *Shafron*, and the Ontario Superior Court's decision in *Bonazza* are clear in their direction to employers: courts will not employ "blue-pencil" severance to save an otherwise ambiguous descending scope restrictive covenant.

What this means for employers:

1. Now, more than ever it is imperative that the terms of a restrictive covenant be drafted carefully, reasonably and precisely. There is little room to wiggle. Employers must get it right the first time. If not, the restrictive covenant may be declared unenforceable in its entirety creating the potential for considerable harm to the employer. For example, should a former employee be restricted from soliciting former customers and employees for three months, six months or a year? Should the restrictions apply to the City of Niagara Falls, the Province of Ontario or all of Canada? What is reasonable in the circumstances?

2. Employers that already have these kinds of agreements in the workplace (including non-solicitation agreements), should consider proactive steps to: (i) review the existing language of the agreements, and if appropriate; (ii) amend the agreements to include "unambiguously" defined restrictions. This may require an employee's agreement, and quite possibly fresh consideration. Given what may be at stake for an employer, the effort and short-term cost may be well worth it.

[1] At the time of publication of this newsletter, an application by Mr. Bonazza for leave to appeal was pending.

To learn more and/or for assistance creating, reviewing or amending restrictive covenants in your workplace, please contact a member of our team.

DID YOU KNOW?

According to the recently released Annual Report of the Human Rights Tribunal of Ontario, nearly 65% of all new human rights complaints were employment-based discrimination claims, and of those more than 57% alleged discrimination on the basis of disability?

For assistance dealing effectively with disability issues in your workplace please contact a member of our team.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Pandemic Preparedness and Response

Is Your Organization Ready for the Winter Flu Season?

Do You Have a Workplace Pandemic Plan?

1. **What are an employer's legal obligations?**
2. **What business impact can an employer expect?**
   a. absenteeism
   b. operational constraints
   c. market fluctuations
3. **What steps can an employer take to maximize safety and minimize business disruption?**
4. **What practical considerations should an employer take into account when developing a pandemic plan?**
5. **Lessons learned from SARS and Avian Flu.**
6. **Answers to the top 10 legal questions by employers about pandemic issues.**

Don't be caught unprepared!

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

VENUE: **Mississauga Convention Centre,** 75 Derry Road West, Mississauga 905.564.1920

COST: Please be our guest

RSVP: By Tuesday, November 3, 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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