MANAGEMENT
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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

No Duty to Investigate Where No Discrimination

– so says Ontario's Human Rights Tribunal

On February 24, 2014, the Human Rights Tribunal of Ontario (the "Tribunal") issued its decision in *Scaduto v. Insurance Search Bureau*, an important decision for employers regarding the duty to investigate an allegation of workplace harassment and discrimination. The case was argued by Sherrard Kuzz LLP.

What happened?

Andrew Scaduto was employed with Insurance Search Bureau of Canada ("ISB") for fewer than four months when his employment was terminated for poor performance. There had been numerous attempts to provide Scaduto with additional training and multiple discussions with him about his performance prior to the decision to terminate.

At the termination meeting, Scaduto advised ISB, *for the first time*, he believed his performance became more harshly scrutinized after he told his supervisor he was gay. If Scaduto's allegation was accurate, his termination could have been discriminatory under Ontario's *Human Rights Code* (the "*Code*").

ISB did not launch a formal workplace investigation into the allegation, as at the time of making his complaint of discrimination Scaduto had already been terminated. Shortly thereafter, Scaduto filed an application with the Tribunal, alleging ISB had violated the *Code* by discriminating on the basis of sexual orientation and failing to investigate his allegations.

Is there a duty to investigate?

Scaduto's argument that the *Code* had been breached by ISB's failure to investigate was not novel. Prior decisions of the Tribunal had held that an employer *could* be liable for damages for a failure to investigate even absent a finding there had been workplace harassment or discrimination. Other cases from the Tribunal also suggested the duty to investigate could survive the employment relationship such that an employer would have an obligation to inquire into a claim of discrimination even when raised post-termination.

The Tribunal's decision

Scaduto was not successful in his application.

On the allegation of discrimination in the workplace, the Tribunal found Scaduto was not subject to discrimination either during his employment or in the course of his termination.

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"It does not make sense to say to the respondent you have contravened the *Code* because you have failed to investigate the applicant's complaint, but had you investigated, you would not have found discrimination."

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As for the alleged breach of the "duty to investigate", the Tribunal held there can be no independent duty to investigate a complaint absent actual discrimination. In Mr. Scaduto's case, the Tribunal found he had not been discriminated against, so it would be irrational to then penalize his employer for not having investigated his complaint, when had the complaint been investigated it would have resulted in a finding of no wrong-doing. In the words of the Tribunal:

> This case demonstrates the difficulty of finding a breach of the *Code* solely for the failure to investigate. I have found there was no discrimination in the applicant's workplace. Therefore, there is no contravention of the *Code*. **It does not make sense to say to the respondent you have contravened the *Code* because you have failed to investigate the applicant's complaint, but had you investigated, you would not have found discrimination.**
>
> ....the respondent's failure to investigate the applicant's complaint did not cause or contribute to discrimination in the workplace because it did not exist. **It is inconsistent with the wording of ... the *Code* to conclude the respondent contravened the applicant's rights by failing to investigate his complaint when that failure did not deprive him of a workplace free from discrimination.** [emphasis added]

The Tribunal also held there was no duty to investigate a complaint made *after* an employee is no longer in the workplace:

> A further difficulty with finding the respondent has violated the *Code*.... stems from the fact that the applicant's complaint was made after the respondent decided to terminate his employment. **The purpose of the duty to investigate is to ensure a complainant is not required to work in a discriminatory environment. In this case, the applicant was no longer in the workplace. It could not then be said that the applicant's right to be free from discrimination in his workplace was infringed by the failure to investigate because he was no longer there.** [emphasis added]

Lessons for employers

While this decision is helpful for employers, it should not be interpreted as relieving employers from any responsibility to investigate a complaint of discrimination. Employers should continue to be vigilant in addressing claims of workplace discrimination and harassment from employees who remain in the workplace. As noted by the Tribunal:

> Employers are well-advised to investigate human rights complaints as the failure to do so can cause or exacerbate the harm of discrimination in the workplace. Internal investigations provide employers with the opportunity to remedy discrimination, if found, and can prevent Applications being filed with the Tribunal. They also limit employers' exposure to greater individual and systemic remedies. The failure to do so is at their peril. But, if they fail to investigate discrimination that does not exist, that failure is not, in and of itself, a violation of the *Code*.

To learn more or for assistance addressing human rights issues in your workplace, contact a member of Sherrard Kuzz LLP.

Option to Remain Employed as Means of Mitigation Must be Clear to Employee – so says Court of Appeal for Ontario

Faced with an ever-shifting business landscape, employers periodically find it necessary to reassign duties within the workplace. However, an employer-imposed alteration of duties carries with it a risk an employee may claim constructive dismissal. An Ontario employer recently learned that a failure to adhere to a technical legal requirement can lead to liability.

What happened?

In earlier years, General Coach Canada was primarily engaged in the manufacture of travel trailers, fifth wheels, truck campers and motor homes. However, as market demand shifted, focus narrowed to the production of park model homes and pre-fabricated cabins.

General Coach's Vice-President of Operations, Kenneth Farwell, was a long-term employee with 38 years' tenure. He had worked his way up the ranks, having started in an entry-level position. Unfortunately, Mr. Farwell lacked expertise and experience in General Coach's new product lines - in contrast to his immediate subordinate, Wayne Meidinger, who was an expert.

With challenging economic times exacerbating matters, General Coach decided that business imperatives mandated that Mr. Meidinger's greater expertise be exploited by his assuming Mr. Farwell's role. As a result, Mr. Farwell was offered the position of Purchasing Manager which he had held earlier, but with no change in salary from his vice-presidential level.

Constructive dismissal claim

Mr. Farwell turned down General Coach's proposal because of its lower status and requirement that he report to an employee who previously reported to him. He commenced a lawsuit claiming constructive dismissal.

...after learning of Mr. Farwell's constructive dismissal claim, General Coach should have followed up with Mr. Farwell to advise him that the offer of becoming Purchasing Manager remained open as a means of mitigation. By not having done that. Mr. Farwell's failure to accept the new position could be not seen as a failure to mitigate.

At trial, the judge agreed with Mr. Farwell that the legal test for constructive dismissal had been satisfied. However, a finding of constructive dismissal did not automatically mean that Mr. Farwell was entitled to a legal remedy. Mr. Farwell had a duty to mitigate his losses, which in this case, might have meant taking the position of Purchasing Manager throughout the period of reasonable notice.

The mitigation evidence before the court was that Mr. Farwell had made efforts in a poor economy to find other employment but was not successful for many months. General Coach argued that as part of his legal duty to mitigate his damages Mr. Farwell was obliged to accept the job of Purchasing Manager; the salary and working conditions would have been almost the same as for his previous position, the only difference being a likely reduction in bonus. Giving effect to this argument would have eliminated Mr. Farwell's damages. The trial judge rejected General Coach's argument because, in the judge's view, it would have been "humiliating and embarrassing … in [Mr. Farwell's] mind" to be required to work in a lower position and report to his previous subordinate.

The appeal

General Coach appealed to the Court of Appeal for Ontario on the basis the trial judge erred in applying a *subjective* test as to what was "in Mr. Farwell's mind", rather than applying the legally required *objective* test.

If an employee rejects continued employment, and proceeds to assert a constructive dismissal claim, an employer must re-offer employment to invoke an employee's duty to mitigate vis-à-vis that offer.

The Court of Appeal declined to consider whether the trial judge had applied the correct legal test, focussing instead on what the Court saw as a fatal omission on the part of General Coach once Mr. Farwell had turned down its offer. According to the Court of Appeal, after learning of Mr. Farwell's constructive dismissal claim, General Coach should have followed up with Mr. Farwell to advise him that the offer of becoming Purchasing Manager remained open as a means of mitigation. By not having done that, Mr. Farwell's failure to accept the new position could be not seen as a failure to mitigate:

> [General Coach's] mitigation argument presupposes that the employer has offered the employee a chance to mitigate damages by returning to work. To trigger this form of mitigation duty, [General Coach] was therefore obliged to offer Mr. Farwell the clear opportunity to work out the notice period after he refused to accept the position of Purchasing Manager and told [General Coach] that he was treating the reorganization as constructive and wrongful dismissal... There is no evidence that [General Coach] extended such an offer to Mr. Farwell. Accordingly, Mr. Farwell did not breach his mitigation obligation by not returning to work.

Tips for employers

Making changes to an employee's position is a tricky business, with many pitfalls even with the best of intentions. To minimize the risk of a successful constructive dismissal claim, employers are reminded of the following important points:

1. **Constructive dismissal is not just a matter of compensation.** If a restructuring results in a reduction of an employee's status and prestige, the employee may have a valid constructive dismissal claim, even if income is unchanged.
2. **The obligation to mitigate by remaining with the terminating employer only arises if there is a clear opportunity to mitigate.** If an employee rejects continued employment, and proceeds to assert a constructive dismissal claim, an employer must re-offer employment to invoke an employee's duty to mitigate vis-à-vis that offer.
3. **The obligation to mitigate by remaining with the terminating employer is assessed on an objective, "reasonable person" standard.** Even if it is suspected that an employee will not accept a new role, the court will apply an objective, "reasonable person" test, considering such factors as how the employee was treated on termination, his history with the company, and how and why the new role was created, *etc*. If an employer is able to show a "reasonable person" would have returned to the employer, then the employee could be found to have failed to mitigate.
4. **Legal advice usually required.** Because of the complexity and tact required in this legal area, it is highly advisable for an employer to seek out legal advice before taking steps involving substantial changes to an employee's position. Once a constructive dismissal has been commenced it is often difficult to turn back the clock.

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

DID YOU KNOW?

Changes to the *Canada Labour Code* as of April 1, 2014

Federally regulated employers should take note of recent changes to the *Canada Labour Code* (the "*Code*") brought on by the *Jobs and Growth Act* (also known as Bill C-45). Amendments include new time limits for complaints of unpaid wages or other allegations of a violation under Part III of the *Code*, time limits on payment orders, and a new administrative review process for payment orders or notice of unfounded complaints.

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

MANAGEMENT COUNSEL

HReview
Seminar Series

Please join us at our next HReview Breakfast Seminar:

Managing the Difficult Employee

Employers often speak of spending 80% of their time managing 20% of their workforce. Common themes include *employees consistently late to work, "sick"-related absences on Fridays and Mondays* or simple *poor performance*. It is often easy to identify who the offending employees are. It can be more difficult to determine how to change their behaviour. To help your organization more effectively manage these "difficult employees", this *HR*eview will address:

Performance and Productivity

- The importance of recognizing the cause of performance and productivity issues.
- How to effectively implement a performance improvement system.
- Tips and traps to using discipline in managing performance.

Attendance Management Techniques

- Creative approaches for changing behaviour and re-engaging the chronically late or "no show" employee.
- How to request the right type of medical information.
- Deciding when to discipline for attendance issues.

When All Else Fails: Terminating the Difficult Employee

- When do performance issues amount to cause for termination?
- When can an employee be terminated for attendance issues?
- Top tips for minimizing liability and managing the fall-out.

DATE: **Tuesday September 16, 2014; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre**, 75 Derry Road West, Mississauga, L5W 1G3

COST: Complimentary

RSVP: **By Friday September 5, 2014 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

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

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Jean Cumming Lexpert® Editor-in-Chief

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