MANAGEMENT
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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

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Preventing Violence and Harassment in the Workplace

We're just getting started...

On November 12, 2005, nurse Lori Dupont was murdered by a physician with whom she worked at a Windsor hospital. The murder did not occur out of the blue. It was the culmination of a series of escalating incidents of harassment which were no secret to hospital management. But management had done little to protect Ms. Dupont. At that time, with the exception of Quebec, no jurisdiction in North America had laws to specifically address violence or harassment in the workplace.

The Lori Dupont murder triggered legislation in Ontario (Bill 168) recognizing harassment and violence as pressing and important social problems, and requiring employers to create policies, train employers and perform risk assessments. Other Canadian jurisdictions followed suit, such that, today, few question the seriousness of workplace harassment, and caselaw has increasingly recognized harassment as being as harmful and destructive as actual violence.

Unfortunately, as we have seen too often, legislative rules and workplace policies will be insufficient where management does not play a responsible role. As well, the internet and 'viral' videos have heightened the risk for employers, virtually ensuring misconduct will be broadcast outside the workplace and around the world.

Within the context of this new and growing awareness of harassment and violence in the workplace, let's look back on the lessons learned in 2015, and forward to the year ahead.

Policies and Protocols Do Not Supplant Role of Management

Perhaps the most notorious harassment story of the year, in the Ghomeshi scandal a radio personality's abuse, harassment and sexual misconduct were condoned by the management of an esteemed major public corporation, the CBC, over a long period of time. An investigation report identified systemic weaknesses at the CBC even though the broadcaster appeared to have in place all required policies, procedures and safeguards. The cause of this failure was found to be rooted in "host culture" which elevated Ghomeshi to the status of media star, and enabled him to be exempted from the rules which governed others.

The lessons learned from this scandal are primarily as follows:

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1. If an organization has a code of conduct (or equivalent), it must be enforced, consistently and transparently. Management cannot allow anyone to be elevated to a special status in which fundamental, non-negotiable rules applicable to the 99%, are relaxed or abandoned for the few.
2. A complaint does not have to be in writing. Liability is created when an employer knows, or ought reasonably to know, there has been a breach.
3. If any member of *management* knows, the *employer* is deemed to know.
4. Wilful blindness is never a winning strategy. Several CBC managers were aware of some kind of misconduct on Ghomeshi's part yet chose to do nothing. This turning a blind eye attracted the harshest criticism, resulting in a finding the CBC *condoned* Ghomeshi's conduct.

The Internet and Instant Infamy

With the internet and viral videos, one does not have to be a media celebrity to become exposed to public scrutiny. In the recent, and now infamous, Hydro One incident, one of its workers shouted sexist obscenities at a TV reporter on-air, which became a viral incident when released to the internet. Aside from the issue of how this type of behaviour reflects on an employer's public reputation, such conduct can raise concerns of co-workers who may develop apprehensions about working along-side a person who reveals such hostility and menace, bordering on violence.

Bottom line: More and more employers are developing and enforcing general codes of conduct which include guidance regarding conduct *outside the workplace*. Because of the immense harm that can be triggered by a 30-second video clip, waiting until an event happens before devising rules is not a prudent option.

Raising the Ceiling for Assault Damages

One might think Ghomeshi, Hydro One and the other issues addressed in this article would be sufficient reason for an employer to be concerned. Yet, none of those incidents have led to a financial damage award against an employer (at least nothing announced publically).

However, the fact is employers have good reason to be concerned that workplace harassment can lead to substantial financial liability. Last year, setting a new high watermark at the Human Rights Tribunal of Ontario, an employer was found liable for sexual harassment committed against two vulnerable workers. The wrongs included repeated sexual propositioning, sexual contact, forced hugging and kissing and, with respect to one worker, three incidents of forced intercourse. One of the workers was awarded $150,000 and the other $50,000, for injury to their dignity, feelings and self-respect.

In another recent decision the Ontario Superior Court awarded a plaintiff almost $300,000 arising from her wrongful dismissal, sexual assault (groping) and sexual and racial harassment. The award included $90,000 in aggravated damages and $42,750 for future therapy, and a further $15,000 to the plaintiff's daughter who claimed the trauma inflicted on her mother resulted in loss of guidance, care and companionship.

While it may be tempting to dismiss those incidents as examples of extreme sexual misconduct, consider that sexual assault is not a requirement for substantial civil liability to arise. In another recent decision an abusive supervisor misconducted himself over the period of a single week including yelling, profanities and one incident of forceful pushing. The Court of Appeal for Ontario assessed the worker's claim at $55,000, for battery and mental distress damages (the worker developed post-traumatic stress disorder), in addition to one year's pay for constructive dismissal.

The Future - Bill 132

Whatever one thinks about the current law of workplace violence and harassment, there is little doubt it will continue to evolve in the direction of increased worker protection and employer obligation. At the end of October 2015, the Government of Ontario introduced Bill 132, the *Sexual Violence and Harassment Action Plan Act*. Of particular pertinence to employers are:

- Enhanced requirements for sexual harassment prevention programs
- Creation of specific duties to protect workers, including rules about the investigation of complaints
- Elimination of the statutory limitation period for civil proceedings based on sexual assault (currently two years)

Protecting the Workplace

The key to protecting a workplace is on-going **education**, responsible **leadership**, and the **development** and **consistent enforcement** of **skillfully prepared workplace policies and protocols**. In practical terms, this means that when a worker makes a harassment complaint, even though legislation may not always clearly spell this out, an employer is generally obliged to take all reasonable steps to investigate the complaint, including appointing an investigator (internal or external, depending on the circumstances); interviewing witnesses; making findings and implementing discipline, where appropriate. An employer that fails or refuses to take these steps enhances the chances it will become the subject of the next viral video or a defendant in a ruinous legal proceeding.

2015 was a busy year and 2016 is likely to continue the trend. The time to act is now.

To learn more and for assistance in your workplace, contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

In 2014, 69% of couple families in Canada with at least one child under 16 years of age had two working parents, up from 36% in 1976 *(Statistics Canada)*. This has resulted in an ever-increasing number of requests for accommodation on the basis of family status.

To learn more and for assistance addressing accommodation in your workplace, contact a member of Sherrard Kuzz LLP.

Has Court of Appeal for Ontario Slammed The Door Entirely Shut on Financially Struggling Employers?

In tough economic times employers want and need flexibility to reduce or retool their workforces with the least expense possible. Unfortunately, when terminating employment without cause the cost to an employer of providing notice can be considerable. Some employer counsel have argued an employer's financial difficulty should justify a reduction in the notice period. While this argument appeared to gain approval in 2014 and 2015, the Court of Appeal for Ontario has recently all but slammed the door shut on this concept.

Recent Caselaw

In 2014, hopeful words for financially strained employers were found in a 2014 Ontario Superior Court of Justice decision, *Gristey v. Emke Schaab Climatecare Inc.* In reference to the amount of notice claimed by the employee in that case, the presiding judge stated:

> I think ... that 12 months is too high when one factors in the economic considerations. This was a tough decision for the company. **It was entitled to adjust its operations in light of the relatively poor market prevailing at the time…It would not be fair to the defendant to apply the full 12-month notice period.** [emphasis added]

These concerns echoed words from a much earlier decision of the Ontario Court of Appeal dating back to 1982, *Bohemier v. Storwal International Inc.*:

> Payment in *lieu* of notice involves a cost to the employer for which there is no corresponding production or benefit. **In my view, there is a need to preserve the ability of an employer to function in an unfavourable economic climate. He must, if he finds it necessary, be able to reduce his work force at a reasonable cost.** [emphasis added]

Throughout the three decades since *Bohemier* was decided instances of its application had been rare. Accordingly, *Gristey* was seen as a signal of a potential turning of the tide against ever increasing notice periods. Then, in a January 2015 decision, *Michela v. St. Thomas of Villanova Catholic School*, more seemingly good news for employers. The defendant-school had laid off three teachers with varying periods of service of 8 – 13 years, due to reduced enrolment. In defending the teachers' claim for wrongful dismissal damages, the school enjoyed initial success in arguing for a reduced notice period on the basis of its difficult financial situation. The motion judge stated:

> It should be self-evident that, by its nature, the School could not provide the security of employment offered by larger, more established and better-funded institutions. The teachers must be taken to have understood the circumstances of their employer… This cannot be ignored in assessing what is reasonable notice. It is an aspect of the "character of the employment" as referred to in *Bardal v. Globe & Mail Ltd.*..

Unfortunately, this victory for employers was short lived as, on appeal, the Court of Appeal for Ontario took the view *Bohemier* had been misinterpreted. Increasing the notice periods to 12 months, the appeal court expressly disagreed that any of the "*Bardal* factors" (character of employment, length of service, age and availability of similar employment) enabled the school to rely on its financial situation, stating:

> [T]his court has never held that an employer's financial difficulties justify a reduction in the notice period. It does no more than to hold that difficulty in securing replacement employment should not have the effect of increasing the notice period unreasonably…
>
> Nevertheless, it is clear that *Bohemier* has caused some confusion in wrongful dismissal litigation. Most recently, it was relied on in *Gristey v. Emke Schaab Climatecare Inc.*,…in reducing an employee's notice period by one-third as a result of the relatively poor state of the market and the financial health of the employer.
>
> It is important to emphasize, then, **that an employer's poor economic circumstances do not justify a reduction of the notice period to which an employee is otherwise entitled having regard to the Bardal factors.** [emphasis added]

What does this mean for employers?

Despite these discouraging words from the Court of Appeal, *Bohemier* need not be interpreted as a finding that *Gristey* was wrongly decided. In *Gristey*, the employer led evidence showing there would have been less work available to Mr. Gristey during the period of reasonable notice; hence the monetary value of that notice period should be reduced to reflect actual loss. In other words, as Mr. Gristey would have earned reduced income had he worked throughout his notice period, it may still have been appropriate for the award to be adjusted so as to compensate for the amount actually lost. Indeed, there are likely other cases where it would be appropriate to adjust pay in *lieu* of notice downward in order to compensate for actual loss suffered.

Accordingly, despite the cautionary words of the Court of Appeal, the potential for relief for an employer in a difficult circumstance may not have been eliminated in all cases. However, any hope for wholesale relief against escalating notice periods in challenging economic circumstances seems almost certainly forlorn.

Bottom line is this: Leaving it to courts to determine what should be paid upon termination is an expensive exercise, with the stakes spiralling ever higher. **The best and most reliable protection for an employer remains a properly drafted employment contract that clearly and skillfully identifies the expectations of the parties in the event employment terminates.** The optimal time to enter into an employment contract is before employment commences. However, with appropriate preparation, there are also opportunities to introduce a contract mid-employment.

For more information and assistance preparing employment agreements to protect your business, contact a member of Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

Ontario Employers!

Critical Amendments Are Coming to the *Employment Standards Act* and *Labour Relations Act*! *Learn. Get Involved. Prepare.*

In 2015, Ontario launched public consultations *(Changing Workplaces Review)* into amendments to the *Employment Standards Act* and *Labour Relations Act.* An Interim Report is expected to be released in early 2016. **Recommendations will be far reaching and, we believe, have a dramatic impact on the regulation of Ontario workplaces. Yet, to date, there has been little employer participation in the consultative process.**

Recommendations could include:

Employment Standards Act

- Increased minimum entitlements for part-time, casual and temporary agency employees
- Joint client – contractor liability for contractor employees (*i.e.*, temp agencies, building services, franchisor/franchisees, *etc.*)
- Reconciliation and/or expansion of protected leaves
- Fewer exemptions from the application of the ESA
- Heightened enforcement, inspection and audit processes

Labour Relations Act

- Unionization: Replacement of the vote process with a card based system
- Greater access to employee contact information given to trade unions
- Automatic access to interest arbitration to resolve disputes
- Increased regulation of strikes/lockouts (*e.g.*, ban on replacement workers; time-limited strikes, *etc.*)
- Increased Labour Board powers to regulate the trade union–employer relationship (*e.g.*, multi-site collective agreements, increased enforcement powers, greater financial penalties, *etc.*)

Join us and learn about the **significant amendments** under consideration, **key opportunities for employer participation**, and **how best to prepare** for increased regulation of your workplace.

DATE: **Tuesday May 31, 2016; 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

COST: Complimentary

RSVP: **By Monday May 16, 2016 (spaces limited) at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Hours: This seminar may be applied toward general CPD hours.

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

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