SHERRARD KUZZ LLP
Barristers & Solicitors

Management Counsel

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Another Company Executive Jailed Following Charges Under the *Occupational Health and Safety Act*

"The statistics demonstrate an alarming number of injuries to young workers in the Province of Ontario."

THE DECISION

In a recent decision of the Ontario Court of Justice, the Court has demonstrated its increasing willingness to incarcerate company executives found to be in contravention of the *Occupational Health and Safety Act* (the "*Act*").

In *C.M. Midway Ltd.* (Ontario Provincial Court, November 2, 2001), a traveling carnival company and the company's officer and director were charged with:

(i) failing to take every precaution reasonable in the circumstances for the protection of a worker;

(ii) failing to provide information, instruction and supervision to a worker; and

(iii) permitting a person who is under the age prescribed by the *Act* to be in or about a workplace.

The injured worker, a thirteen year old boy, suffered a punctured lung and was paralyzed after a piece of the carnival ride he was dismantling fell on him.

In finding the company and one of its officers responsible for the critical injury to the worker, the Court noted the company's failure to take appropriate steps to protect its employees. Particularly, the Court found that:

- In walking under the cars while dismantling them, the employee was clearly engaging in a "dangerous maneuver", contrary to the manufacturer's operating instructions.
- There had not been any health and safety training at the workplace.
- The employee had not been given training on how to dismantle the ride in question, and had not been advised that the method he had adopted was incorrect.

SENTENCING

In determining the sentence to be ordered, Madam Justice Baldwin considered a number of factors, including:

- the size of the company involved;
- the scope of the economic activity at issue;
- the extent of the actual and potential harm to the public;
- the maximum penalty described by statute;
- whether the employer and its officers had demonstrated remorse; and
- evidence of steps taken by the employer to ensure that events in questions would not be repeated.

Madam Justice Baldwin also placed great emphasis on the rise of workplace injuries and fatalities to young workers in Ontario and the important role of deterrence:

These statistics demonstrate an alarming number of injuries to young workers in the Province of Ontario. The evidence called was that in 1998 there were 15,120 claims by young workers as a result of accidents reported to the Workplace Safety and Insurance Board. In that year, 15 young workers were killed. In 1999 there were 15,837 claims for young workers put in by employers to the Workplace Safety and Insurance Board; 17 fatalities in the age group of 15 to 24 for that year. In the year 2000 there were 17,222 lost time claims for injuries reported to the Workplace Safety and Insurance Board; 16 fatalities in that year for young workers.

...

Without being harsh, the fine must be substantial enough to warn others that the offence will not be tolerated and must not appear to be a mere license for illegal activity. The deterrence in this context acts not merely in the sense of achieving compliance by threat of punishment, but in a sense of a moral or educative effect.

In the case at hand, the company and officials charged failed to attend the trial and therefore did not offer any evidence in their own defence. As a result of the lack of any evidence going to mitigation, the trial

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judge determined that that the need for deterrence was "very high."

WHAT DOES THIS CASE MEAN FOR EMPLOYERS?

The implications of this case go beyond simply affirming that an employer is responsible for the health and safety of workers.

Employers should not expect that if convicted under the *Act* any penalty will be restricted to fines. As evidenced by this and other cases, where critical injuries or deaths are involved, Ontario Courts are increasingly willing to order not only significant fines, but also incarceration for individuals in positions of responsibility.

WHAT STEPS SHOULD EMPLOYERS TAKE?

There are a number of steps employers should take toward creating and maintaining a safe workplace:

- Ensure you have in place a joint health and safety committee in accordance with the *Act* to identify and address potentially unsafe workplace conditions.
- Educate all staff, particularly managers and supervisors, about the requirements of the *Occupational Health and Safety Act* and all related legislation.
- Regularly review your workplace safety policies and procedures to ensure that they are current, effective and responsive to the needs of workers.
- In the unfortunate event of an accident, be prepared to demonstrate the steps your organization has taken to ensure the ongoing health and safety of its workforce.

Senior Management Not Immune To Termination For Sexual Harassment

DECISION AT TRIAL

In a recent and significant decision of the Ontario Court of Appeal, the Court sent a clear warning to employers that they risk liability if they do not act to eliminate sexual harassment and provide employees with a harassment-free workplace.

In *Simpson v. Consumers' Assn. of Canada*, the Ontario Court of Appeal confirmed that an employer has cause to terminate an employee who sexually harasses other employees or creates a sexually infused office environment.

Mr. Simpson was the Executive Director of the Consumers' Association of Canada ("the CAC"). The CAC terminated Mr. Simpson for inappropriate conduct toward several female staff and volunteers which included: making sexually suggestive comments to an executive assistant at a hotel and at a bar while on business travel; initiating detailed sexual conversations with the corporation's inhouse legal counsel and taking her to a strip club following dinner with a client meeting; skinny dipping in the company of colleagues at Mr. Simpson's cottage following a business meeting; nude bathing in a hot tub in the company of staff while on a business trip and sexually touching a staff member in a hospitality suite while he and staff were attending an annual general meeting.

At the trial level, the judge found that the CAC did not have cause to dismiss Mr. Simpson. While he acknowledged that Mr. Simpson engaged in conduct of a sexual nature, the trial judge dismissed all of the incidents as either occurring outside the workplace or as consensual conduct.

"It is the job of senior employees to ensure that the employer's duties to its workforce and to its shareholders, in this case, effectively the public, are carried out so that the employer is protected. If the supervisor creates the problem, he is in breach of that duty."

- Ontario Court of Appeal

DECISION ON APPEAL

The Court of Appeal overturned the trial decision for a number of important reasons:

- First, the Court of Appeal found that the trial judge ought to have but did not

apply an objective standard when assessing Mr. Simpson's conduct. In other words, the Court found that regardless of whether there was consent or apparent consent, the conduct was inappropriate for a supervisor and therefore "unwelcome".

- Second, the Court rejected the proposition that the "workplace" could not include the after-work interaction between a supervisor and an employee, where that interaction could detrimentally affect the work environment or lead to negative job-related consequences.
- Third, the Court confirmed that there is an onus on supervisory employees to be proactive in eliminating sexual harassment. Senior employees have two types of duties: first, to members of the workforce who are entitled to protection from offensive conduct, and second, to the employer, to protect it against civil suits at the hands of individual complainants.
- Fourth, the Court rejected the position that Mr. Simpson's conduct could be excused because the CAC did not have a Sexual Harassment Policy and that the CAC had a sexually charged work culture (an argument accepted by the trial judge).

The Court embraced a broad definition of "sexual harassment" and concluded that in the circumstances it was hard to imagine an alternative to termination:

...sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment.... When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

WHAT DOES THIS CASE MEAN FOR EMPLOYERS?

The implications of this case go beyond affirming that the employer had cause to dismiss its executive director. Given the executive director's conduct that finding in itself is not surprising.

More significant is the Court's strong affirmation of a supervisor's and employer's duty to provide a workplace free from sexual harassment. An employer that turns a blind eye to this duty and fails to take positive action to eliminate sexual harassment may face serious consequences. These consequences may include employee complaints to the Human Rights Commission, or claims by employees for constructive dismissal where harassment has poisoned the work environment.

WHAT STEPS SHOULD EMPLOYERS TAKE?

There are a number of steps employers should take toward creating and maintaining a workplace free from sexual harassment:

- Create and implement an effective and proactive sexual harassment policy.
- Educate all staff, particularly managers and supervisors, about sexual harassment and its implications for everyone in the workplace.
- Regularly review your sexual harassment policies and procedures to ensure that they are effective and up to date with the most current Court and Human Rights jurisprudence.

DID YOU KNOW THAT...?

Ontario MOL Has Published Employment Standards Information Poster

The Ontario *Employment Standards Act, 2000* (the "*Act*") and its Regulations came into force on September 4, 2001 and include a number of new entitlements and obligations that impact upon virtually every Ontario workplace.

Under the *Act* every employer is required to post a copy of the poster entitled "What You Should Know About The Ontario *Employment Standards Act*". The poster, released in December, 2001, provides a summary of several provisions of the *Act* including those concerning Overtime Pay, Public Holidays, Notice of Termination and Severance Pay.

If you have not yet received your copy of the poster, please contact Sherrard Kuzz LLP at 416.603.0700 - we would be pleased to provide you with a copy. Please note that supplies are limited - call soon!

Breakfast Seminar

Sherrard Kuzz LLP invites you to join us for our ongoing series of employment and labour law updates.

TOPIC: Recent Developments in Employment Law

DATE: March 5, 2002, 7:30 a.m.–9:00 a.m. (breakfast will be provided)

VENUE: To Be Confirmed

Watch for your faxed invitation the week of February 4, 2002 or contact Angela Duldhardt at 416.603.0700 to request an invitation.

HRview Seminar Series

SHERRARD KUZZ LLP
Barristers & Solicitors

155 University Avenue
Suite 1500
Toronto, Ontario Canada M5H 3B7
Phone: 416.603.0700
Fax: 416.603.6035
Email: info@sherrardkuzz.com

Michael G. Sherrard
Direct: 416.603.6240
msherrard@sherrardkuzz.com

Erin R. Kuzz
Direct: 416.603.6242
erkuzz@sherrardkuzz.com

Thomas W. Teahen
Direct: 416.603.6241
tteahen@sherrardkuzz.com

Madeleine L. S. Loewenberg
Student-at-Law
Direct: 416.603.6244
mloewenberg@sherrardkuzz.com

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