SHERRARD KUZZ LLP
Barristers & Solicitors

Management Counsel

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TEMP AGENCY FINED $5 MILLION FOR VIOLATIONS OF THE *WORKPLACE SAFETY AND INSURANCE ACT*

On Friday February 28, 2003, the Ontario Court of Justice sent a dramatic signal to employers when it ordered a temporary staffing agency and two of its officers to pay more than $5 million in fines following guilty pleas on charges under the *Workplace Safety and Insurance Act* ("WSIA").

THE FACTS

Following a June 2003 automobile accident that claimed the lives of five company employees, the Security and Investigations Branch of the Workplace Safety and Insurance Board ("WSIB") commenced an investigation.

Among other things, the investigation revealed that following the accident the company's vice-president of operations had submitted fake invoices to the WSIB in an effort to disguise the fact that the driver of the vehicle was an independent contractor and not a company employee. Had the driver been an independent contractor, the dependents of the workers who had died in the accident may not have been eligible for survivor benefits under the WSIA. However, as the company's employees were being transported to work locations from a company office, the occupants of the vehicle were deemed to be in the course of their employment at the time of the accident.

The WSIB investigation also uncovered that the company had engaged in numerous violations of the WSIA wholly unrelated to the accident. For example, the company had deliberately underreported its monthly payroll in an effort to reduce its premiums, and had filed false forms regarding workplace accidents by showing that injured workers had not missed work time.

The company pleaded guilty to five counts of submitting false or misleading information for which it was fined $900,000. The company's vice-president of operations was fined $50,000 after pleading guilty to two counts of submitting false or misleading information in relation to employee claims for benefits. The president of the company also received a $50,000 fine on a guilty plea to one count of submitting false payroll information and one count of submitting false and misleading information to the WSIB.

Courts will not tolerate deliberate non-compliance and will punish offenders harshly

In addition to all of these fines, the company was ordered to pay $4 million in restitution to the WSIB for underreporting its monthly payroll.

PRACTICAL IMPLICATIONS FOR EMPLOYERS

There are a number of lessons learned as a result of the Court's decision in this case.

First, the extensive penalties imposed highlight the serious consequences employers may face if they deliberately violate the WSIA. Courts will not tolerate deliberate non-compliance and will punish offenders harshly. In addition, as a result of the Court's decision in this case, the WSIB is likely to prosecute offenders more rigourously than ever.

Second, the Court's decision underscores the WSIA's application to the supply of labour industry (i.e. temp agencies, etc.). Namely, the agency supplying and paying the worker, not the employer to whom the worker is supplied ("the contracting employer"), is responsible for covering the workers under the WSIA. As well, all workers supplied are compulsorily covered under Schedule 1 of the WSIA even if the work being carried out, or the business activity of the employer to whom the workers are supplied, is not compulsorily covered by the WSIA.

Finally, although the WSIA does not impose coverage obligations on the contracting employer, we suggest that a contracting employer ought to clearly define its relationship with a temp agency in a written agreement. Otherwise, a non-compliant temporary agency that comes under scrutiny from the WSIB (or for that matter another agency such as Canada Customs and Revenue), could argue, in an effort to avoid its own liability, that the contracting employer is the "true employer" and therefore responsible for ensuring that employees have WSIA coverage. A written agreement should aim to eliminate this potential discrepancy.

We strongly encourage all contracting employers to ensure that written agreements with temporary agencies include the following:

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TEMP AGENCY...

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- An acknowledgement that the workers supplied by the temporary agency are the employees of the temporary agency and not, for any purpose, the employees of the contracting employer;
- An acknowledgement that the temporary agency is solely responsible for the payment of all compensation to the workers supplied;
- An acknowledgement of the temporary agency's obligations to provide WSIA coverage for the supplied workers;
- A written indemnity from the temporary agency in relation to any liability or costs incurred as a result the agency's failure to comply with its statutory obligations including those under the WSIA and the *Income Tax Act*.

For more information or for assistance in respect to any of the matters referred to, please contact any member of our legal team.

Breakfast Seminar

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

TOPIC: **Harassment in the Workplace: Practical Tools for Human Resource Professionals**
DATE: Thursday, May 15, 2003, 7:30 a.m. – 9:00 a.m.
(program to start at 8:00 a.m.; breakfast provided)
VENUE: Toronto Board of Trade - Country Club, Fireside Lounge
20 Lloyd Street, Woodbridge, Ontario
Phone: 416.746.6811

HReview Seminar Series

Watch for your faxed invitation the week of March 31st, 2003 or call 416.603.0700 to request an invitation.

NEW *LIMITATIONS ACT* CREATES 2-YEAR LIMITATION PERIOD

On December 9, 2002, *An Act to Improve Access to Justice* received Royal Assent. Schedule B to this Act is the *Limitations Act 2002* ("the *Act*") which will significantly shorten the time for commencing personal actions in Ontario including claims for breach of contract such as claims for wrongful dismissal.

Although the *Act* has not yet come into force, this could occur at any time without advance notice. Therefore, now is the time to consider how the Act may affect potential claims involving your organization.

The *Act* establishes a basic limitation period requiring all actions (with few exceptions) to be commenced within two years from the date the claim is discovered. This replaces the general limitation periods found in the current *Limitations Act*, including the standard six-year limitation period that now applies to contract and tort claims, including claims for wrongful dismissal. Exceptions to the two year limitation period will be specifically identified in the Act.

Other noteworthy aspects of the *Act* include:

- Codification of the discoverability principle. Under the Act, the most significant date in determining when a limitation period begins to run is the date on which the claim was discovered or reasonably could have been discovered by a potential plaintiff.
- Establishment of an Ultimate Limitation period of fifteen (15) years. Subject to limited exceptions, a plaintiff will be unable to pursue an action after the 15th anniversary of the day on which an act or omission occurred even where the existence of the cause of action is not discovered; and
- Establishment of a variety of proceedings in respect of which there is no limitation period including: proceedings for declarations, proceedings to enforce an arbitration award, proceedings arising from sexual assault in certain circumstances, and proceedings in respect of undiscovered environmental claims.

The *Act* also sets out comprehensive rules governing the treatment of claims that arose prior to the coming into force of the *Act*. Given the extensive scope of these new rules, they cannot be fully addressed in this article. However, their impending presence makes it important that organizations begin to consider and develop now effective strategies to address how the Act will affect current or potential litigation.

For more information about the *Act* and its potential implications for your organization, please contact us.

IMPRISONMENT OF ANOTHER EMPLOYER PROVIDES REMINDER OF *OCCUPATIONAL HEALTH & SAFETY ACT* OBLIGATIONS

In its enforcement of the *Occupational Health and Safety Act* (the "*Act*"), the Ministry of Labour has sent employers another message that if they fail to take all reasonable precautions to protect the health and safety of workers, they risk not only substantial fines, but also a jail sentence.

JAIL SENTENCE INCREASED

In our January 2002 edition of *Management Counsel*, we wrote about the director of a company called C.M Midway who was jailed for 45 days following the death of a young employee working for the carnival company.

On February 25, 2003, the Ontario Court of Justice sentenced another employer to a jail term under the *Act*, only this time the sentence was 90 days together with a $10,000 fine.

That employer, Robert Stokfish, is a roofing contractor. On May 5, 2000, one of Stokfish's employees fell and was killed while shingling the roof of a house. He was not wearing a fall arrest system at the time.

Virtually all construction projects are subject to complex regulations governing health and safety on work sites. In certain circumstances, identified in the *Act*, workers must be provided with and wear fall arrest protection. There are also stringent requirements as to what constitutes an appropriate fall arrest system.

In the *Stokfish* case, the Court heard evidence that the worker had not been told to wear fall arrest protection, nor had he been required to do so when working for Stokfish in the past. The evidence also revealed that although Stokfish's workers were aware that fall arrest protection should generally be worn, they did not think that they needed protection while working on this "small" roofing job.

The fundamental starting point to every due diligence defence under the OHSA is the employer's ability to demonstrate that it complied with the basic requirements of the Act

Following a trial at which he did not appear, Stokfish was convicted of having failed to take every precaution reasonable in the circumstances for the protection of a worker, and for having failed to comply with the fall arrest provisions of the *Act* and Regulations thereunder.

The *Stokfish* decision is yet another demonstration of the Court's continued and increasing intolerance of employers' violations of the *Act*. Employers must not ignore the strong message that Courts are sending: non-compliance will not be treated lightly.

DUE DILIGENCE

In the event of a charge under the *Act*, one of the most effective defences available to an employer is that of "due diligence". To successfully argue due diligence, an employer must satisfy a Court that it did, in fact, take all reasonable steps to protect the health and safety of workers, and that no reasonable precaution could have prevented the accident.

The fundamental starting point to every due diligence defence is the employer's ability to demonstrate that it at least complied with the basic requirements of the *Act*. Failure to demonstrate this will almost certainly lead to the failure of the due diligence defence.

BASIC OBLIGATIONS

Although by no means an exhaustive list, two of the most basic obligations under the *Act* are:

1. Putting into place a health

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DID YOU KNOW...?

The General Contractors' Section of the Toronto Construction Association has requested that the Ontario Labour Relations Board provide a more precise description of the boundaries of OLRB Area 8? The Board is currently considering the issue (Board File 1633-02-M), with the assistance of submissions provided by members of the construction labour relations community. We will advise as soon as the Board issues a decision in this matter.

OHSA OBLIGATIONS.....

Continued from p.3

and safety policy which is posted at the workplace and reviewed at least annually, as well as a program to implement that policy; and

2. Providing all employees with a "competent person" as a supervisor, meaning one who is qualified to organize the work and its performance, is familiar with the *Act* and its regulations, and has knowledge of any potential or actual danger to health or safety in the workplace.

Complying with these requirements not only provides the building blocks to a due diligence defence, but failure to comply can lead to charges under the *Act*. For example, on March 13, 2003, an Oakville tool and manufacturing company was fined $45,000 for, among other things, failing to prepare and review annually a written health and safety policy, and to develop and maintain a program to implement that policy. That case involved serious hand injuries to a worker operating a punch press machine.

Although these are clear and straightforward obligations, many employers have yet to comply with these basic provisions of the *Act*, leaving themselves and their employees exposed to considerable risk.

Every employer must ensure that it is familiar not only with the general requirements of the *Act*, but also those specific requirements that relate to its specific place of business or industry.

COST EFFECTIVE BUSINESS PRACTICES

Apart from the obvious benefit of complying with the provisions of the *Act* - workers' safety - ensuring workplace safely is the most cost effective way of doing business. It not only reduces Workplace Safety and Insurance obligations, but also goes a long way to ensure that neither the employer nor any of its supervisors or principals will face the prospect of prosecution under the *Act*.

If you would like more information about what your company can or should do in order to comply with the provisions of the *Act*, please contact any member of our legal team.

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Providing management with practical strategies that address workplace issues in proactive and innovative ways.

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