SHERRARD KUZZ LLP
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COURTS EXPANDING THE CONSEQUENCES OF HARASSMENT

Increasingly, employers are aware of their responsibility to provide a workplace free of harassment. However, courts are challenging traditional understandings of the types of harassment from which an employer must protect its employees. Beyond sexual harassment, or harassment on the basis of race or ethnicity, recent court decisions in several Canadian jurisdictions have expanded the scope of an employer's responsibility to include a general duty to provide a workplace that treats employees with decency and civility. An employer's failure in this regard can amount to constructive dismissal and successful claims for damages.

COMMON CONCEPTS OF CONSTRUCTIVE DISMISSAL

Constructive dismissal is commonly understood to arise when an employer makes a unilateral change to a fundamental term of employment of an employee. If the change is significant and the contract term central to the employment relationship, courts have concluded that the employee is entitled to treat the employment relationship as being at an end and to claim damages for wrongful dismissal. Typical examples include a greater than nominal reduction in an employee's salary or benefits, a demotion or the removal of significant perquisites.

EXPANDING THE CONCEPT

Recently, courts have begun to expand the traditional understanding of constructive dismissal to include an employer's failure to provide a respectful working environment.

For instance, in Ontario the court has stated that a constructive dismissal may take place "whenever the conduct of a manager is such that a reasonable person in the circumstances should not be expected to persevere in the employment" (*Shah v. Xerox Ltd.*).

In *Lloyd v. Imperial Parking Ltd.* an Alberta court held that the employer had breached a fundamental term of the employee's contract when it permitted the employee's supervisor to incessantly criticize and threaten the employee with dismissal. The court held that a fundamental term of the employment contract was the "implied term that the employer will treat the employee with civility, decency, respect and dignity."

> *"... a fundamental term of the employment contract is the 'implied term that the employer will treat the employee with civility, decency, respect and dignity.' "*

The employer's responsibility to provide a workplace in which employees are treated with civility and dignity relates not only to the interaction between employees and their supervisors. In *Morgan v. Chukal Enterprises* a British Columbia court concluded that an employee had been constructively dismissed as a result of ongoing abusive behaviour against her by a co-worker. Significantly, the court found that it was irrelevant that it was not the employee's direct supervisor committing the impugned behaviour. Rather, the fact that the employer was aware of the abusive behaviour and failed to take appropriate steps to stop it constituted the constructive dismissal.

In a Manitoba case, *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.*, an employee successfully claimed constructive dismissal following a course of harsh and unreasonable criticism from a government consultant working with the employer. The company had taken steps to investigate the incidents and ultimately decided to place the employee on probation. In determining that the employee had been constructively dismissed, the court was critical both of the employer having permitted the consultant to treat the employee in an abusive manner and in having placed the employee on probation.

WHAT THESE CASES MEAN FOR EMPLOYERS

The net result of these cases and others with similar reasoning is the following:

1. Court decisions in several Canadian jurisdictions have expanded the scope of an employer's responsibility to provide a harassment-free workplace to include a general duty to

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provide a workplace that treats employees with decency and civility;

2. This general duty has been characterized as a fundamental term of the employment contract, the breach of which can amount to a constructive dismissal;

3. An employee's claim need not identify a specific act of a specific individual, but may identify a poisoned work environment generally;

4. Generally, unless the individual committing the offending acts is a senior member of the organization, the employer does not automatically bear responsibility for the actions of co-workers toward one another or even of a front line supervisor to a member of his or her staff;

5. However, if the employee can show that responsible members of the organization were aware, or ought reasonably to have been aware, of the conduct in question the employer will be held responsible for a constructive dismissal; and

6. Whereas in most cases an employee will have made an informal or formal request that the organization correct an abusive situation, a complaint is not necessary if the employer, with reasonable diligence, ought to have known that the offending behaviour was taking place.

Is an employer required to continuously monitor the behaviour of each and every employee, or police every day interactions between staff members? No. In fact, constant surveillance of employee activity can itself be considered abusive. Nevertheless, given the ultimate responsibility borne by employers to provide a respectful workplace environment, prudent and proactive employers will foster open dialogue with employees and encourage the raising of issues sooner rather than later. In the words of one Ontario judge, "[t]he onus is on employer to identify the challenges in the workplace and take appropriate steps."

WHAT SHOULD EMPLOYERS DO?

All employers must appreciate (if they do not already) that they will be held liable if they allow to develop a corporate culture which encourages, or even tolerates, abusive treatment of staff members. Outdated concepts of "ruling with an iron fist", or governing through stress and fear now carry the potential for consequences far greater than simply lowering employee morale and productivity.

WHAT STEPS CAN EMPLOYERS TAKE?

First, there is no greater or more effective way to develop a respectful workplace environment than to lead by example. Senior management must set the standard which all employees are expected to meet.

Second, as mentioned above, prudent and proactive employers will foster open dialogue with employees and encourage the raising of issues in a tolerant and welcoming environment, early in the process before matters are given the opportunity to escalate.

Third, every employer ought to have in place a comprehensive and effective harassment policy which should:

1. Address not only established concepts of harassment, such as sexual and racial harassment, but also more general concepts such as the requirement that all employees be treated with respect and dignity;

2. Clearly set out the company's intolerance for the prohibited behaviour, and the consequences if a complaint is well-founded;

3. Include enforcement mechanisms that are clear, effective and "user friendly" for employees;

4. Be introduced to all employees, included in employee handbooks and posted in prominent locations in the workplace; and

5. Be enforced impartially, and effectively, regardless of the alleged offender's rank or position within the company.

Once a complaint has been filed, it is crucial that the employer fully and impartially investigate the complaint. To this end, many employers choose

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Breakfast Seminar

Our series of employment and labour law update seminars will break for the Summer, but we invite you to join us again when we resume in the Fall.

TOPIC: To be announced in the August, 2003 issue of *Management Counsel*
DATE: Thursday, September 18, 2003, 7:30 a.m. – 9:00 a.m.
(program to start at 8:00 a.m.; breakfast provided)
VENUE: Wyndham Bristol Place Hotel, Toronto Airport
950 Dixon Road, Toronto

HRreview Seminar Series

Watch for your faxed invitation the week of August 4th, 2003 or call 416.603.0700 to request an invitation.

to retain investigators from outside the workplace, although this is not always necessary. It is also important to provide the individual accused of harassment with an opportunity to respond to the accusations.

At the end of the day, it is fundamental that every individual appreciate that a respectful workplace environment is not only the goal and responsibility of management but of each and every employee, and that issues of harassment, if and when they arise, will be dealt with fairly, thoroughly and respectfully. Not only is this the law, it makes good management sense.

If your organization would like to discuss this subject matter further, please contact any member of our legal team, each of whom is skilled and experienced at developing, updating and addressing effective workplace harassment policies.

DID YOU KNOW...?

That the Supreme Court of Canada has recently ruled that the Ontario Government's appointment of retired judges to sit as interest arbitrators under the *Hospital Labour Disputes Arbitrations Act* was patently unreasonable? The Court has declared that the Minister of Labour must ensure that prospective arbitrators are not only independent and impartial, but must possess labour relations expertise and be recognized in the labour relations community as acceptable to both management and labour.

NEW ONTARIO LEGISLATION CREATES SARS-EMERGENCY LEAVE

As discussed in our *HReview* Seminar, **Effectively Dealing with SARS in the Workplace** (April 28, 2003), the presence of Severe Acute Respiratory Syndrome ("SARS") in Ontario has required employers to confront significant challenges ensuring that employees are not exposed to SARS in the workplace, and addressing SARS-related absenteeism.

Recently, the Ontario Government passed legislation which, among other things, clarifies leave entitlement and job protection for any employee absent from the workplace for a SARS-related reason.

The *Act*, known as the *SARS Assistance and Recovery Strategy Act, 2003* (SARSA), was both introduced and passed on April 30, 2003. The *Act* was intentionally backdated so that its effective date is March 26, 2003, and it will continue in force until a date to be determined by the Provincial Government.

The *Act* creates the concept of SARS-Emergency Leave, which applies when an employee is in quarantine or isolation, or is subject to a control measure in accordance with SARS related directions issued to the public or to one or more individuals. SARS-Emergency Leave also applies if the employee is directed not to attend work by his or her employer because of concerns that the employee may expose SARS to other employees in the workplace. An employee is also entitled to SARS-Emergency Leave in the event that the employee is unable to work because they are needed to provide care or assistance to a relative who has been affected by SARS.

While the *Act* does not limit the number of SARS-Emergency Leave days or part days an employee may take, SARS-Emergency Leave days are unpaid. As well, the employer must continue to make any contribution it would otherwise make to any benefit plan to which the employee would be entitled if at work.

Following a SARS-Emergency Leave an employee must be returned to his or her pre-leave position, if that position still exists, or to a comparable position if it does not exist. The employee must be paid the greater of the employee's pre-leave wage rate, or the rate to which he or she would be entitled if they had worked the period of the leave.

NO REPRISALS

The *Act* also contains "no reprisal" provisions much like those contained in the *Ontario Employment Standards Act* ("ESA"). The provisions prohibit the dismissal or penalizing of any employee for taking SARS-Emergency Leave. However, because the effective date of the legislation (March 26, 2003) pre-dates the day on which the *Act* was actually passed (April 30, 2003), employer liability for having dismissed an employee is limited to damages commencing the later of the day of the dismissal, or April 30, 2003.

The *Act* also provides for enforcement by the Employment Standards

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Branch, and an Employment Standards Officer retains the right to order the reinstatement of the employee in addition to damages. Appeal of any Officer's order may be made to the Ontario Labour Relations Board.

OBLIGATIONS ON EMPLOYEES TAKING LEAVE

The *Act* requires that, within two days of the start of a SARS-Emergency Leave, an employee must contact public health officials or a physician to obtain formal direction that the leave should be continued, and ultimately written confirmation of that direction. If a physician or public health official does not direct the employee to remain in quarantine, that employee has no entitlement to SARS-Emergency Leave beyond the initial two day period.

Employees making use of SARS-Emergency Leave are required to notify their employer prior to the leave, if possible, or in any event, as soon as possible after commencement of the leave. An employer may request evidence that is reasonable under the circumstances that the employee is entitled to the leave.

In many ways, the new legislation mirrors the Emergency Leave provisions of the ESA which guarantees, in workplaces regularly employing fifty or more employees, that employees may take up to ten days per year in order to deal with a personal health related matter, a death or urgent, unforeseen matter relating to the employee's immediate family (which is broadly interpreted). However, there are important distinctions to be made:

1. The *Act* expressly states that entitlement to SARS-Emergency Leave is over and above entitlement to emergency leave under the ESA;

2. Unlike ESA Emergency Leave, the *Act* does not set a threshold requirement of fifty or more employees; the *Act* applies in every Ontario workplace; and

3. The *Act* expressly provides that employees who have taken a SARS-Emergency Leave are deemed to have taken SARS-Emergency Leave rather than ESA Emergency Leave. Therefore, employers must ensure that employees having taken SARS-Emergency Leave are credited with any used ESA Emergency Leave days.

While employers still face challenges associated with employee absenteeism due to SARS, SARSA provides some clarity with regard to both employer obligations and employee entitlements during this period, which should result in more consistent approaches to SARS-related absenteeism.

If you require further information on either SARSA or the health and safety impacts of SARS in the workplace, please contact any member of the Sherrard Kuzz LLP legal team.

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