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SUPERVISOR CHARGED WITH CRIMINAL NEGLIGENCE IN CONSTRUCTION FATALITY

Merely five months after becoming a part of Canada's criminal law, on August 26, 2004 the York Regional Police arrested and charged a Newmarket supervisor with criminal negligence causing death arising out of a construction site fatality. One of the first criminal charges laid since Bill C-45 became law in Canada, if found guilty, this supervisor could face up to life imprisonment.

The charge arose from the alleged failure to properly supervise two people who were using a mini-excavator to dig a 12 foot trench at the front of a garage to repair a drainage problem at the foundation of a residential home. One of the men was inside the excavation when the ground gave way trapping him in heavy dirt. He ultimately succumbed to his injuries. The allegation is that the supervisor had left the scene just moments before the accident occurred. The accused supervisor is scheduled to appear in the Ontario Court of Justice in Newmarket on November 15, 2004.

CRIMINAL CHARGES FOR HEALTH AND SAFETY VIOLATIONS

As of amendments which came into force on March 31, 2004, section 217.1 of the *Criminal Code of Canada* requires that, "everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task".

A violation of this new criminal law could result in a fine of up to $100,000 against an organization, and a fine and/or imprisonment for up to 25 years against a representative or senior officer. This could be in addition to any fine or imprisonment which may be levied under the applicable health and safety legislation.

It is important to recognize that the terms "organization", "representative" and "senior officer" are defined broadly in the Criminal Code. "Organization" includes a company, firm, partnership and trade union. "Representative" includes a director, partner, employee, member, agent or contractor of the organization. And "senior officer" is not exclusive to what one normally associates with the term - president, vice-president, chief executive officer, chief financial officer, etc. - but includes an individual who plays an "important role" in the establishment of the organization's policies and who is responsible for managing an important aspect of the organization's activities. Needless to say, the term "important role" is open to interpretation and will likely be hotly contested in the courts as charges continue to be laid under the new law.

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WHAT THIS MEANS FOR YOUR ORGANIZATION

There are many steps an organization can take to respond to these new and onerous criminal responsibilities. Some are industry-specific, while others more general in nature. In each case the responsibility to provide a safe workplace is on-going and should be reevaluated at regular intervals. Every organization should:

1. Educate and re-educate every member of the organization about the evolving nature of workplace safety, the legal obligations (federal and provincial) and cost of non-compliance both financially and in human terms.
2. Conduct a detailed internal audit of safety practices and protocols.
3. Create formal and informal lines of communication that encourage and applaud the free-flow of safety ideas, information and concerns both actual and potential.
4. Foster a workplace environment in which every person is encouraged and expected to plan safely, work safely and take responsibility for the safety of everyone around them.

If in doubt, contact any member of our legal team who will assist you to understand and navigate these new and onerous Criminal Code obligations.

COURT DECLARES DENIAL OF ESA SEVERANCE UNCONSTITUTIONAL

In a recent decision, the Ontario Divisional Court declared unconstitutional provisions of the Ontario *Employment Standards Act* ("ESA") which provided that severance pay was not payable to an employee whose employment had been frustrated due to illness or injury.

THE CASE

In *Mount Sinai Hospital v. The Ontario Nurses Association*, (2004), [69 O.R. (3d) 267 (C.A.)] the Hospital dismissed a nurse on the basis of innocent absenteeism due to disability. Relying on then section 58(5)(c) of the ESA, the Hospital refused to pay the nurse severance pay. The provision provided that severance pay was not payable to a terminated employee whose contract had become impossible to perform or had become frustrated by the illness or injury. Section 9 of the current Termination and Severance Pay Regulations to the ESA contain similar language.

The union grieved on the nurse's behalf.

THE GRIEVANCE

The Arbitration Board upheld the Hospital's decision on the basis that the nurse's employment had become frustrated, and rejected the union's argument that section 58(5)(c) violated the *Canadian Charter of Rights and Freedoms* (the "Charter"). The union had argued that under section 15 of the Charter (equality rights) the provision violated the nurse's right to equal treatment under the law and equal benefit of the law without discrimination on the basis of physical disability.

THE COURT RULING

The Divisional Court agreed with the union, quashed the Arbitration Board's decision and declared section 58(5)(c) of no force and effect. In doing so, the Court stated:

> "The denial of a benefit that is intended to recognize past service, by reason of severe and prolonged disabilities, devalues this group in that it rests on assumptions that the contributions of this group of disabled individuals are worth less than the contributions of employees who do not fall into the group. The denial of the benefit to a group already disadvantaged by their disability and the loss of their employment by reason of their disability is discriminatory and not demonstrably justified."

As a result of this decision, an employer that wishes to terminate an employee whose employment has become frustrated by disability will be required to pay statutory severance (even though pay in lieu of notice - statutory or common law - may not be payable due to the frustration).

THE APPEAL

The Hospital has been given leave to appeal this decision to the Ontario Court of Appeal. We will keep readers apprised of the progress of the appeal.

Breakfast Seminar

Next in our series of employment and labour law seminars:

TOPIC: *LABOUR RELATIONS UPDATE*

- *Recent Trade Union Strategies*
- *Applications for Certification*
- *Collective Agreement Highlights*
- *Recent Arbitration Awards*

HReview Seminar Series

DATE: Tuesday, November 09, 2004
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, ON

Watch for your faxed invitation the week of October 4th, 2004 or call 416.603.0700 to request an invitation.

AN OUNCE OF PREVENTION…

Although the dispute in Triumph Tool Ltd. v. Foster, [2004] O.J. No. 788 was worth only $17,500; the lesson to be learned for employers is invaluable.

THE FACTS

When David Foster joined Triumph Tool he was aware that he would have to forgo his annual bonus with his former employer. This was a difficult decision for Foster because his bonus was valued at $17,500 and he would lose the entire amount if he quit his employment before the end of the calendar year.

Not insensitive to Foster's position, Triumph Tool offered Foster a signing bonus of $17,500.

THE DISPUTE

The dispute arose when Foster quit his employment with Triumph Tool less than two years after taking the job.

According to Triumph Tool, at the time of his hire an important condition was placed on Foster's bonus entitlement; namely that he remain an employee of Triumph To ol for at least two years. If Foster quit his employment before the end of the two year period, he would be required to repay the bonus to Triumph Tool.

According to Foster, no such condition existed.

> The Court found that "both Foster and [Triumph Tool] were sloppy with paperwork" and could have avoided this whole dispute had they prepared and signed a clear and precise employment contract.

THE EMPLOYMENT CONTRACT

At the time of his hire, Foster had received an offer letter that set out the terms and conditions of his employment. The letter did not mention Foster's bonus or the terms of its repayment.

Triumph Tool maintained that the information about the terms of the bonus was set out in an addendum to Foster's offer letter.

Foster claimed no such addendum existed.

THE TRIAL

At the trial, Triumph Tool produced a copy of the addendum signed by Triumph but not by Foster who maintained that he had never received the letter.

As such, the Court was required to decide the dispute on the basis of the party's respective credibility. That is, on the balance of probabilities is it more or less probable that the parties agreed that the signing bonus was conditional upon Foster staying with Triumph Tools for a minimum of two years? On this issue the Court noted that despite each having impressive and sound business reputations, it was clear (and "sad") that "one of them [was] simply lying over $17,500 before tax".

The Court then evaluated a number of pieces of evidence and found that, on the whole, it was more likely than

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DID YOU KNOW…?

In a long awaited decision, the Supreme Court of Canada has ruled that surplus assets in a defined benefit pension plan must be distributed at the time of the partial wind-up of the plan [Monsanto Canada Inc. v. Ontario [Superintendent of Financial Services]] .

PREVENTION...

Continued from inside

not that Triumph Tool had provided Foster with the bonus on the condition that it be repaid if Foster left his employment inside of two years.

Of particular significance was the evidence of a former manager of Triumph Tools who testified that Foster had come to him shortly before resigning and asked to see his employment file to determine his obligations to Triumph Tool should he leave the company. The manager gave Foster a copy of the employment contract and addendum, following which Foster noted that he hadn't signed the addendum and asked whether it would be enforceable given the lack of a signature. This fact, together with a number of others, led the Court to conclude that Foster had been aware of the condition placed on his bonus.

Even more significantly, the Court found that "both Foster and [Triumph Tool] were sloppy with paperwork" and could have avoided this whole dispute had they prepared and signed a clear and precise employment contract.

LESSONS LEARNED

Although in this case the employer was ultimately successful, the Court's decision could easily have gone the other way. Any time a judge must determine, on the basis of incomplete and imprecise evidence, who among the witnesses is "lying", the final decision cannot be predicted.

A little clarity can therefore go a long way, and a well drafted employment agreement can not only define the terms of an employment relationship, but help to avoid unnecessary disputes and costly litigation.

As well, employers must be careful to ensure that any employment agreement complies, at a minimum, with the Employment Standards Act, 2000 (the "Act"). Employment agreements which fail to comply with the Act may be unenforceable. In every case, the assistance of an experienced employment lawyer should be sought to draft an agreement that meets the needs and protects the interests of the parties.

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