MANAGEMENT
COUNSEL
Employment and Labour Law Update

Human Rights Commission Ordered To Pay Employer $210,000 In Legal Costs

Employers often express frustration that costs cannot be awarded against an employee who files a frivolous human rights complaint even when the complaint is dismissed on the basis that it is without merit. Fortunately, some redress may be available.

In the case of *Jeffrey v. Dofasco* (December 20, 2004) the Human Rights Tribunal of Ontario (the "Tribunal") - the body that holds hearings and ultimately makes determinations of human rights complaints - ordered the Ontario Human Rights Commission ("Commission") - the body that decides which complaints will be sent to a hearing before the Tribunal and which 'prosecutes' those cases - to pay to an employer some of its litigation costs.

The Tribunal made this order because it found that the complaint was trivial, frivolous, vexatious, made in bad faith, and had caused undue hardship to the employer. In other words, the Tribunal found that the complaint ought never to have been processed by the Commission.

Not surprisingly cost orders against the Commission are few and far between. The *Jeffery* decision is therefore significant because it provides employers with some insight into the circumstances in which they may be able to recoup the costs of successfully defending a human rights complaint.

THE FACTS

Ms. Jeffrey was terminated after a four year absence from employment due to an alleged disability. During her absence, Ms. Jeffrey claimed that she was unable to perform the duties of her job, or any job that had been offered by her employer, and that Dofasco had failed to accommodate her by providing her with suitable work.

Dofasco was suspicious of Ms. Jeffrey's claim: no medical evidence was provided to support the claim that she was unable to work in any position, the Workers' Compensation Board (as it was then called) disagreed with her assertions and it appeared Ms. Jeffrey's primary goal was not to return to work, but rather to receive retraining services from the Workers' Compensation Board.

Ms. Jeffrey had also successfully applied for CPP benefits on the basis that she was not capable of pursuing any gainful occupation because her disability was of an indefinite duration. In other words, Ms. Jeffrey's CPP claim was inconsistent with her claim that she was able to perform some sort of work and that Dofasco had failed to accommodate her.

THE TRIBUNAL'S DECISION

The Tribunal dismissed Ms. Jeffrey's complaint as having been made in bad faith. Specifically, it found that Ms. Jeffrey:

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- Lied about the medical advice she claimed to have received from her physicians
- Fabricated doctors' visits on her CPP disability pension application
- Exaggerated her medical condition to her doctors and before the Tribunal
- Alleged that she was totally disabled for the purpose of receiving CPP benefits, but then alleged that she was not totally disabled for the purpose of her human rights complaint
- Failed to tell Dofasco what type of work she could perform, or what skills she possessed that may allow her to be accommodated in her employment
- Failed to seek medical clearance to return to work when an offer of light duties was made
- Advised the Commission that Dofasco was not offering her the opportunity to seek medical advice prior to accepting the offer of modified work, when this was not true
- Made false allegations in her complaint to the Commission, and maintained those allegations throughout
- Possibly tampered with evidence before the Tribunal

THE AWARD AGAINST THE COMMISSION

The Tribunal strongly criticized the Commission for having proceeded with the complaint and as such failing to uphold its duty to act in the public interest:

> *As the publicly funded institution with exclusive responsibility for the enforcement of the [Human Rights] Code, the Commission has the important duty of prosecuting the complaint in an unbiased, objective, fair and efficient manner.*

Specific to Ms. Jeffrey's complaint, the Tribunal found that the Commission had:

- Failed in its obligation to conduct a proper investigation into Ms. Jeffrey's complaint against Dofasco
- Failed to interview key witnesses and examine documents which would likely have established that Ms. Jeffrey's complaint was without merit
- Improperly referred Jeffrey's complaint to the Tribunal when the complaint lacked credibility
- Failed to provide appropriate disclosure to Dofasco - the Commission was found to have resisted the production of certain documents despite a court order

> ***"The Tribunal strongly criticized the Commission for having proceeded with the complaint and, as such, failing to uphold its duty to act in the public interest."***

The Tribunal ordered the Commission to pay Dofasco $210,000 - an amount equal to 50% of what it had cost Dofasco to defend the complaint.

LESSONS LEARNED

While cost awards against the Commission are extremely rare, they can occur when it is clear that a complaint ought never to have been processed. The question is: What can an employer do to strengthen its argument that a complaint should never have been brought forward by the Commission? There are a number of steps employers should consider:

- Upon first learning that a complaint may be made to the Commission, immediately and proactively, investigate the allegation. If possible, do not wait until the Commission becomes involved
- Collect all evidence and interview every potential witness. If possible, reduce the evidence to writing, including sworn statements
- Create and preserve as complete an evidentiary record as possible - keep a record of every document and statement provided to the Commission, as well as the date on which the document or statement was provided. This is particularly important where there is a concern that the Commission is not conducting an adequate investigation
- If there is a concern that the Commission is not properly considering or using evidence provided to it, set out the concern in writing to the Commission
- When communicating to the Commission, be respectful but vigilant

The lawyers at Sherrard Kuzz LLP *can assist clients to respond to human rights complaints - actual or prospective - including designing and managing appropriate workplace investigations and communicating with the Commission.*

DID YOU KNOW?

A Nova Scotia jury recently awarded the highest ever "bad faith" damages award against an employer in a Canadian employment law case - four months' salary and an additional 48 months in "bad faith" damages to an employee who had been employed for only two-and-a-half years.

Suspension Without Pay - How And When?

In a recent decision of the Ontario Superior Court of Justice, (*Carscallen v. FRI Corporation*) the Court held that the suspension - without pay - of a non-unionized employee may not constitute constructive dismissal in certain, defined circumstances. Traditionally, the use of unpaid suspension as a means to discipline a non-unionized employee has been seen as constructive dismissal.

THE FACTS

Ms. Carscallen, a 43 year old marketing executive, worked for FRI Corporation. Despite certain shortcomings in her performance Ms. Carscallen enjoyed 14 years of employment with FRI, was awarded performance bonuses and allowed the perquisite of flexible hours.

Circumstances changed for Ms. Carscallen when she failed to track an essential package which was to meet her boss in Spain for use at an important trade show. When the package failed to arrive, several heated emails were exchanged between Ms. Carscallen and her employer. Both the tone and substance of Ms. Carscallen's emails were considered insubordinate.

The following week Ms. Carscallen was suspended without pay "until further notice". A few days later she was advised that in addition to the suspension, she was demoted to the position of marketing manager, lost her opportunity for flexible hours and was assigned to a shared cubicle with a subordinate.

Ms. Carscallen left her office and never returned. She commenced an action for constructive dismissal.

THE COURT'S DECISION

The Court determined that Ms. Carscallen had been constructively dismissed. In particular the loss of title, prestige and status, in addition to the suspension without pay for an indefinite period of time, was a repudiation by FRI Corporation of Ms. Carscallen's employment contract. The Court also found that the sanctions imposed were intended to punish and embarrass Ms. Carscallen in a "punitive, mean spirited [and humiliating manner]" designed to cause Ms. Carscallen to resign her position.

SUSPENSION WITHOUT PAY

The Court found that the suspension without pay of a non-unionized employee would *not* be considered constructive dismissal in three general circumstances: 1. when the employment contract or workplace policy contains an explicit provision allowing the employer this form of discipline; 2. when such a provision or policy is implied; 3. when dismissal for cause would be justified, but unpaid suspension is used as an alternative to dismissal.

1. Express Term in Contract or Company Policy

Focusing the analysis in terms of the distinction between "white" and "blue" collar employment relationships, the Court held that an express term in a contract or company policy is more likely to be sustained if there was equal bargaining power between the employee and employer:

> *In the white collar non-unionized setting, if the right to suspend with or without pay is contained as an express term in a written contract fairly and freely bargained for, or is specified in a company policy and procedure manual that has been properly accepted and incorporated by reference into the terms and conditions of employment, the law may give effect to the parties' intention.*

That said, even where the employee is "white" collar the Court noted that an express provision will not be sufficient unless the employee has a right to seek a review of the decision to suspend. In other words, some form of appeal process must be available to the suspended employee:

> *In the white collar non-unionized setting, if a right of suspension is to be contracted for, and upheld as fair and reasonable, a right of review must exist in the contract or policy akin to the unionized employee's right to grieve. The supervisor imposing the discipline must not be permitted to be the sole judge, jury and executioner. There must be an opportunity to have whatever penalty is imposed reviewed by another party. In the instance in which the CEO seeks to impose the discipline, a review might involve consultations with an independent human resources professional.*

Neither the contract between FRI Corporation and Ms. Carscallen, nor the employer's workplace policies contained a provision allowing for unpaid suspension. Even if it had, the Court determined that in this case an inequality of bargaining power existed which would render the provision meaningless.

2. Implied Term

Typically, courts take a restrictive approach toward "implied" terms. In this case, the employer's workplace policies spoke of "fair and constructive disciplinary guidelines" allowing for "rehabilitation in the workplace rather than punishment". In these circumstances, the Court held that to imply a term allowing unpaid suspension - particularly of indefinite length - would contradict the employer's own workplace policies and procedures.

3. Just Cause

The Court held that where an employer has just cause to dismiss an employee, it follows that an employer would have the right to impose a lesser form of discipline, such as suspension without pay.

In this case the Court found that there was no just cause to terminate Ms. Carscallen. Although she was less than diligent in her efforts to ensure the Spanish trade show went off without a hitch, her transgressions were not severe enough to warrant termination.

LESSONS LEARNED

While this decision may be appealed, the ruling may signal the beginning of a new era in common law dismissal. Should the decision stand it will be important for employers to consider the following factors when contemplating the suspension of a non-unionized employee:

1. A suspension without pay could be susceptible to a claim for constructive dismissal unless: a) there is a clear provision in the employment contract or workplace policy allowing for this form of discipline which the employee has

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accepted as a term of their employment; or b) where such a provision could be implied.

2. Even where such a provision or policy exists, a court will look at whether there was an "equality of bargaining power" at the relevant time. The less senior the employee the greater the likelihood a court will find that there was not an equality of bargaining power. In that case, the provision or policy is likely to be found invalid. This is particularly so if the employee is not afforded an opportunity to challenge or review the decision to suspend - akin to a right to grieve.

3. Any suspension should be for a designated time period, and as short as is necessary to achieve the goal of correcting the behaviour at issue. The longer an unpaid suspension the greater the chance an employee will successfully allege constructive dismissal.

4. Where there is just cause to terminate the employee a defined term unpaid suspension may be substituted for a just cause dismissal. However, in this scenario, the court will scrutinize whether just cause ever existed.

To discuss how the Court's decision in this important case may affect the efficient and effective administration of your workplace, contact any member of our legal team.

BREAKFAST SEMINAR

Next in our series of employment and labour law updates:

HReview
Seminar Series

TOPIC: Recent amendments to the Ontario *Labour Relations Act*:

- How and when the Labour Relations Board will exercise its power to automatically certify a union where an unfair labour practice has been proven.
- The effect of card-based certification on the construction industry.
- How and when the Labour Relations Board will exercise its interim powers, including ordering the reinstatement of an employee even prior to a full hearing into the propriety of the employer's actions.

DATE: Thursday, Sept. 15, 2005, 7:30 a.m. — 9:00 a.m. (program to start at 8:00 a.m.; breakfast provided)

VENUE: Wyndham Bristol Place (Toronto Airport), 950 Dixon Road, Toronto, ON

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