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Employment and Labour Law Update

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Labour Board Orders Union to Return $50,000 to Employer

In a recent case argued by Sherrard Kuzz LLP , the Ontario Labour Relations Board ("the Board"), ordered a union to return to an employer, the sum of $50,000 being held as security pending the completion of a corporate audit into alleged violations of the collective agreement. The Board's decision is unusual - particularly as it relates to the construction industry - in that the funds were ordered returned despite the fact that the audit apparently remained unfinished.

THE FACTS

In 2002, the Trustees of the Health and Welfare Plan prescribed by the collective agreement between DCC Carpentry ("DCC") and Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America ("the Union") sought a bond in the amount of $50,000 from DCC (at the time not represented by counsel) pending the completion of a corporate audit. When DCC did not comply the Union filed a grievance and referred the grievance to the Board.

On the day of the hearing the parties entered into Minutes of Settlement pursuant to which DCC provided a bond in the form of a bank draft (not a letter of credit) for $50,000 on January 26, 2003. No time was set for the return of the bond.

An audit commenced. However, three years hence, there was no evidence that the audit had been completed. Nor was DCC ever advised whether there had been any finding that the collective agreement had been breached. As such, DCC sought the return of its $50,000 and referred the grievance to the Board.

THE ISSUES

The Union resisted the order for repayment on a number of grounds summarized as follows:

1. The funds were with the Trustees, over which the Board had no jurisdiction (the Trustees were not parties to the collective agreement). DCC should therefore commence proceedings in the Ontario Superior Court of Justice as against the Trustees directly.
2. The bond was posted with the Trustees. As such the Union could not return something it did not have.

THE DECISION

The Board disagreed with the Union on all grounds.

First, the Board held that it had jurisdiction over the matter. In 2002, the Union, not the Trustees, referred the grievance to the Board seeking an order that the employer post a bond in the amount of $50,000. This was appropriate as the collective agreement made no provision for the Trustees to enforce the collective agreement. Only the Union could have made the request.

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Second, it was well within the Board's jurisdiction to address what was the central issue in this case: the reasonableness of the decision of the Union or of the Trustees to continue to retain the bond. In 2002, had the Union asked the Board to order DCC to post a bond for 50 years, the Board would have had the jurisdiction to consider the reasonableness of such a lengthy period of time.

Third, the funds were not to have been paid in satisfaction of a debt, but held as security for any debt or liability that might be established in the audit. As such, no party had any right to keep the $50,000 unless it was established that DCC had violated the collective agreement.

Finally, given the relationship among the parties, the bond was to have been delivered to the Union to be held in trust for the Trustees pending the results of the audit. It was therefore the responsibility to the Union - not the Trustees - to retrieve and return the funds:

> *"Since the bond was impressed with an explicit trust, we will assume that the Union has taken steps to ensure that it has treated the bond with the appropriate level of care. If it is physically in the hands of the Administrator of the Trust Fund, it will be up to the Union to retrieve it."*

In the circumstances the Board ordered the return of the funds:

> *"What we have, then, is an order that is three years old, requiring DCC to deliver to the Union a bond in the amount of $50,000 to secure payment of contributions that may be found to be owing, either as a result of the audit that was to be conducted at the same time or perhaps for future violations. We have no evidence of the result of any audit, nor is there an allegation of a violation of the collective agreement since January 31, 2003. There is no reason before us as to why the bond ought not to be returned. It was after all only security for the payment of potential liabilities. The $50,000 does not represent any sum owing to the Union or the Trustees. There is no good reason to deprive DCC of the use of that much money for any longer.[1]"*

LESSONS LEARNED

There are three principal lessons learned:

1. Whenever possible, ask the Board to expressly include in its order a reasonable time period within which an audit must be completed and reported to all appropriate parties.
2. Any funds posted as security should be in the form of a revocable bond, not cash or a bank draft.
3. Seek the assistance of experienced counsel before participating in any Board proceedings which may affect your organization.

[1] The Union was given a further, brief period to disclose the results of the audit - which have yet to be disclosed.

DID YOU KNOW?

Recent passage of compassionate care legislation in BC means that employees in that Province may now take up to 8 weeks unpaid leave to care for a family member if a medical practitioner has certified that the family member is at significant risk of death within 26 weeks. Alberta and the Northwest Territories are now the only jurisdictions in Canada that do not provide compassionate care leave.

Interesting Math?

Q: When is 32 weeks' pay less than 19 weeks?
A: When it's the *Employment Standards Act*.

In Ontario, provincially regulated employers are required to pay statutory Termination Pay of up to 8 weeks to terminated employees. Many larger businesses are also required to pay statutory Severance Pay to employees of greater than five years service. Statutory Severance Pay accumulates at the rate of one week per year, to a maximum of 26 weeks. Is there any device an employer can use to avoid this *Employment Standards Act* obligation?

The *Employment Standards Act* prescribes a variety of mandatory minimum standards, such as vacation pay, minimum wage, holiday pay, etc. The *Act* does provide that something other than a minimum standard can be contractually agreed upon if the alternative provided is of overall "greater benefit".

A RECENT CASE

In *Assurant Group v Fillion*, Assurant Group was relocating its Toronto offices to Kingston. In order to ensure sufficient staffing to the last day of its Toronto operations, the employer devised a "stay bonus incentive", by which it gave employees 6 months of working notice plus a bonus of 25 percent of that amount, provided the employee stayed until the end of the 6 months. Although Ms. Filion signed her agreement to this, she later disputed its validity.

It could be argued that Ms. Filion was better off under the terms of the "stay bonus incentive" because through it she received a total of 32 weeks of pay, in the form of combined working notice and bonus. On the other hand, her combined Termination and

Workplace Violence - Who Is Responsible?

On November 12, 2005, Marc Daniel, an anesthesiologist at Hôtel-Dieu Grace Hospital in Windsor, Ontario fatally stabbed his former romantic interest, Lori Dupont, a nurse at the hospital. Three months after this tragedy, Ms. Dupont's parents, sister and grandmother filed a $13.5 million lawsuit against the hospital, several of its administrators and the executor of Mr. Daniel's estate.

Although the claim has yet to be proven in court, the case raises complex questions regarding an employer's legal obligation to ensure its employees are protected from acts of workplace violence.

STATUTORY OBLIGATIONS

Every employer has a general duty under applicable health and safety legislation to provide a safe workplace. However, only Alberta, British Columbia and Saskatchewan have legislation that specifically identifies workplace violence as an enumerated health and safety issue that must be addressed.

COMMON LAW - VICARIOUS LIABILITY

Under the common law an employer may be held liable for the actions of its employees so long as the actions occur within the ordinary course or scope of employment or are otherwise authorized by the scope of employment. This form of liability is referred to as vicarious liability. The leading case on the issue of vicarious liability in the workplace is the Supreme Court of Canada decision of *Bazley v. Curry*, [1999] 2 S.C.R. 534 ("*Bazley*"). In *Bazley*, the Supreme Court affirmed the description of vicarious liability as set out above, but also cautioned against an overly broad interpretation of the phrase "within the scope of employment":

> *… an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the employer is conducting or what the employee was asked to do…What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee, mindful of the policies behind vicarious liability.*

An example of a case in which the court held the employer vicariously liable is *Fullowka v. Royal Oak Ventures Inc.*, [2004] N.W.T.J. No. 64 ("*Fullowka*"). In *Fullowka*, a striking miner placed a bomb under the mancar transferring other miners to a site. When it exploded, nine miners died. Two mine inspectors (officers of the Government of the Northwest Territories) were aware of escalating hostility during the work stoppage but failed to take appropriate actions until after the tragedy occurred. The Court held that the actions of the striking miner were foreseeable; that maintenance of a safe mine site was within the purview of the inspectors' employment duties; and that action, including the shutting down of the mine, could have been taken to lower or eliminate the risk of violence. The inspectors' failure to appropriately address the tension and threats of violence was therefore "negligent" and the Government was held vicariously liable.

PRACTICAL TIPS

There are two principal reasons to create and maintain a workplace free of violence: to ensure the well being - physical and otherwise - of employees and visitors to the workplace; and to minimize the potential for legal liability in the event an incident should occur.

To these important ends, every employer should take proactive steps to create a safe workplace environment in which both management and employees appreciate that violence will not be tolerated, and that should it occur will be dealt with swiftly, transparently and fairly.

While each workplace will have unique requirements and resources, the following general steps should be considered:

1. Develop a Workplace Violence Team

- Bring together managers and external resources including legal, law enforcement and health care professionals to discuss how

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Severance Pay entitlement was only 19 weeks. In other words, the 32 weeks was more than 19 weeks of total statutory pay, and therefore Ms. Filion had received a "greater benefit", and was not entitled to any further payments.

THE DECISION

Both the Ministry of Labour and, on judicial review, the Ontario Divisional Court, took the side of Ms. Filion. They reasoned that statutory Severance Pay must be paid regardless of "mitigation". In other words, if employment is terminated, even if the employee finds a better paying job the day following termination, the employee still is paid 100 percent of Severance Pay. As such, the court rejected the argument that the period of working notice could reduce the employee's right to statutory Severance Pay.

Furthermore, no credit was allowed to the employer for the 25 percent stay bonus already paid, as against its Severance Pay obligations. The reason for this was that the amount of the stay bonus bore no relationship to the length of service. The stay bonus was not considered to have been devised in a manner analogous to the calculation of statutory Severance Pay, and therefore should not be looked at as a down payment toward that obligation.

LESSONS LEARNED

An employer will not be able to claim a credit for working notice as against its statutory Severance Pay obligations. There may be ways for an employer to ensure that a stay bonus will be credited against the obligation to pay statutory Severance Pay, if the stay bonus is related to length of service. Any employer contemplating a stay bonus should obtain legal advice.

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to best avoid workplace violence.

- Conduct a workplace risk analysis to identify potential dangers - consider external issues such as general economic conditions as well as internal risks in areas of performance and workplaces stresses.

2. Charge the Workplace Violence Team with Developing a Workplace Violence Policy

- Define workplace violence broadly (include harassment, bullying, teasing and assault).
- Unequivocally make clear that a violation of the policy will not be tolerated and may result in immediate termination.
- Provide a comprehensive reporting structure that ensures issues are quickly brought to the attention of management.
- Create a general response structure to guide managers in their handling of a complaint.

3. Implement the Workplace Violence Policy

- Communicate the Workplace Violence Policy to all people in the workplace - Sincere buy-in from senior executives will greatly increase the likelihood of a successful implementation.
- Enforce the Policy vigilantly - Studies have repeatedly proven that workplace violence rarely occurs without warning signs. Effective enforcement can minimize tragedy.
- Develop a guide that will assist individuals faced with the task of addressing another individual who has violated the Policy. The guide should include step-by-step instructions respecting room layout, posture, notices to security and language to be used during the meeting.

4. Develop an Emergency Contingency Plan

- Create a checklist of contacts (police, ambulance, fire, legal, mental health, security).
- Prepare evacuation plans.
- Prepare a "recovery program" to assist with rebuilding following a violent incident - consider using external resources including mental health professionals and grief counselors.

While no single preventative step can guarantee that a violent act will not occur within the workplace, taken together each of the steps referred to above, will help to create a safer work environment, and also illustrate clearly management's commitment to the safety and well-being of its employees. For more information about how workplace violence issues can be addressed in your workplace, please contact any member of Sherrard Kuzz LLP.

BREAKFAST SEMINAR

Next in our series of employment and labour law updates:

HReview
Seminar Series

TOPIC: **Planning For The Next Pandemic**

- Threats to Ontario employers and employees; lessons from SARS.
- What are governments doing to prepare for an influenza pandemic?
- What should employers be doing, as a component of business continuity planning?
- What are employers'/employees' workplace rights and obligations in the event of a pandemic?

DATE: TBD - TENTATIVE Sep. 21st, 7:30 – 9:00 a.m. (program starts at 8:00 a.m.; breakfast provided).

VENUE: The Toronto Board of Trade, Airport Centre, 830 Dixon Road, Toronto 416.798.6811

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