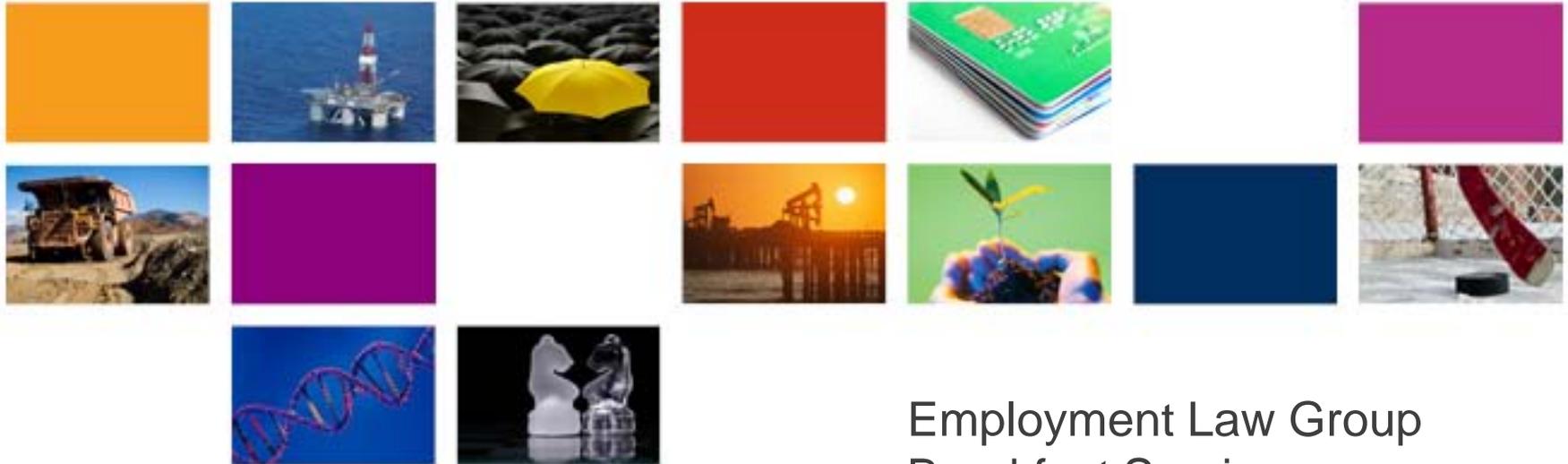
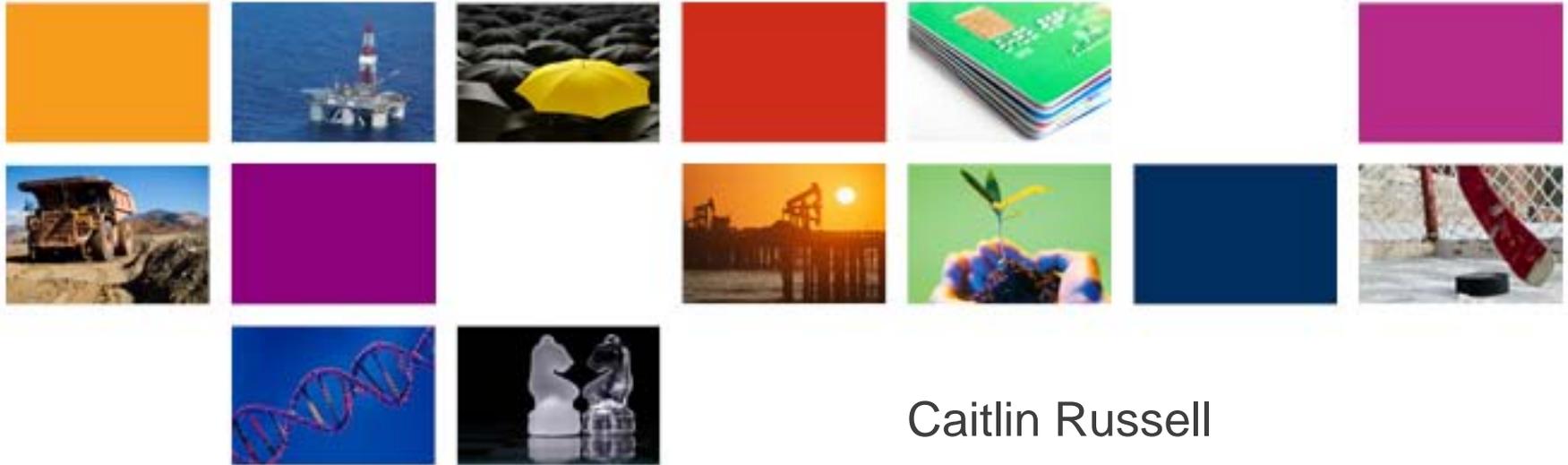


Employment Law Update: Hot Topics for HR Professionals in 2016



Employment Law Group
Breakfast Seminar
October 18, 2016

Employment Law Update: Recent Changes in Legislation



Caitlin Russell
October 18, 2016
Breakfast Seminar

Overview



- Amendments to *Employment Standards Act, 2000*
 - Recap on Bill 18 – The Stronger Workplaces for a Stronger Economy Act, 2014
- Amendments to *Occupational Health and Safety Act*
 - Update on Bill 132 – Sexual Violence and Harassment Plan Act, 2016
- Quick update on *Accessibility for Ontarians with Disabilities Act*

Bill 18: *Employment Standards Act, 2000*

- Part of Ontario's Poverty Reduction Strategy (2014 to 2019)
 - Targeting “vulnerable workers”
- Most of the significant changes impacting the ESA
 - Minimum wage
 - Posting obligations
 - Temporary help agency workers
 - Claims under the ESA
 - Self audits for employers

Minimum Wage & Posting Obligations

- **Minimum Wage** – Current minimum wage for most employees is \$11.40/hour as of October 1, 2016. Now subject to annual indexation based on the rate of inflation. 10th increase since 2003.
- **Posting** – Employers required to post a copy of *What you should know about the Ontario Employment Standards Act* in a conspicuous place in the workplace and provide a copy to employees.

Temporary Help Agency Workers



- Introduced the concept of “joint and several” liability between agencies and client employers for wages, overtime pay, public holiday pay and premium pay for holidays
 - Ensure greater oversight to ensure ESA compliance by temporary held agencies
 - Less incentive to use staffing agencies

Claims under the ESA and Self Audits

- **ESA Claim** – Removed \$10,000 cap. Changed time limit for making a claim for unpaid wages
 - Previously 6 months for unpaid wages or 12 months for a “continuing violation”
 - Now 2 years for all claims (subject to transitional rules) (as of February 2015)
- **Audits** – Employment Standards Officer can order employers to conduct self-audits to ensure compliance with ESA

Recent Compliance Blitz



- **Young Workers Blitz:** Of 273 workplaces, 231 were non-compliant with the ESA. The most common areas of non-compliance were public holiday pay, overtime, vacation pay, record-keeping and hours of work
- **Temporary Foreign Workers Blitz:** Of 70 workplaces, 43 were non-compliant. Most common compliance issues were public holiday pay overtime, vacation record keeping and posting obligations

Bill 132: *Occupational Health and Safety Act*

- Background to the Legislation
 - Royal Assent on March 8, 2016
 - Part of strategy to support survivors of sexual violence and eliminate sexual harassment
 - Amends several laws including *Occupational Health and Safety Act* (OHSA)
 - Expands concepts introduced in 2009 with Bill 168
 - Changes in force as of September 8, 2016

Impact of Bill 132



- Most of the significant changes includes:
 - Definitions of workplace harassment and sexual harassment
 - Mandatory training and written programs
 - Mandatory formal investigations
 - Powers of Ministry of Labour

Definition of Workplace Harassment



- OHSA's definition of "workplace harassment" is being expanded to include:
 - a) Engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or
 - b) Workplace sexual harassment
- A "reasonable action" taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment

Definition of Workplace Sexual Harassment

- “Workplace sexual harassment” is:
 - a) Engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expressed, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome; or
 - b) Making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome

Written Program and Training Requirements

- Written program must:
 - Include procedures for reporting to a person other than employer or supervisor
 - Set out how complaints of harassment will be investigated
 - State that information obtained about a complaint will not be disclosed unless necessary for investigating, taking corrective action or required by law
 - Set out that a complainant and the alleged harasser will be informed of results of investigation
- Training on program is mandatory

Changes to Investigation



- Employers required to investigate all incidents and complaints of harassment in a manner that is “appropriate to the circumstances”
- The Ministry of Labour has power to order an employer to have an “impartial person possessing such knowledge, experience or qualifications as are specified by the inspector” to conduct an investigation
- Impartial investigation at the employer’s expense

Update: *Accessibility for Ontarians with Disabilities Act*



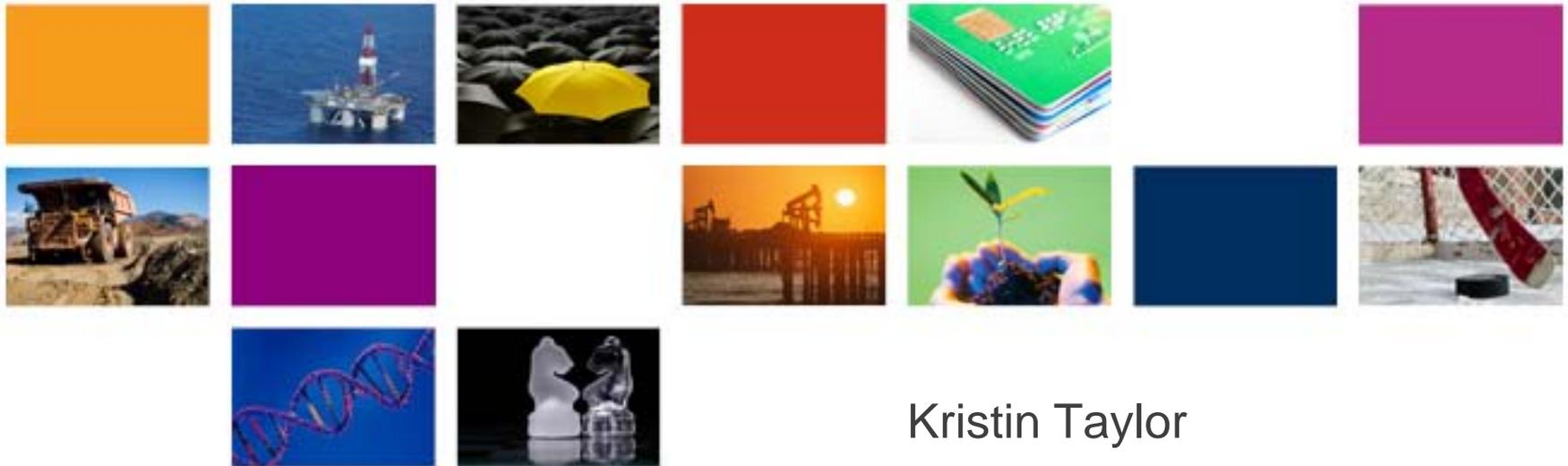
- January 2017: Next Compliance Deadline
 - Small organizations (50 or less): Compliance with Employment Standard under *AODA Integrated Standards*
 - Large organizations: Compliance required in January 2016
 - Compliance reports: December 2017
- July 2016: Amendment to *AODA Customer Service*
 - Most notable: All employees and volunteers to be trained on accessible customer service and how to interact with people with disabilities

Summary and Takeaway



- ESA
 - Consider audits of overtime and holiday pay practices – ESA amendments significantly increase potential liability
- OHSA
 - Revise workplace harassment policies
 - Ensure training requirements are met
 - Consider appropriate investigations
- AODA
 - Keep track of upcoming compliance deadlines
 - Review training records

Employment Standards: Trends, Hot Topics and New Developments



Kristin Taylor
October 18, 2016
Breakfast Seminar

Agenda



- Ministry of Labour Compliance Update
- Employment Standards Case Law Update
- Changing Workplaces Review

Ministry of Labour Compliance Update

- Prosecutions for failing to comply with orders to pay wages:
 - October 2016: Company fined \$70,000 - 7 orders to pay
 - September 2016: Company fined \$15,000 - 5 orders to pay
 - August 2016: Individual sentenced to 1 day in jail + ordered not to start business that employs workers for 1 year

Ministry of Labour Compliance Update

- Government of Ontario YouTube channel:
 - The Employment Standards Act: Know Your Rights:
<https://www.youtube.com/watch?v=YFfGZGJGO80>
- Online Guides:
 - Ontario.ca/ESAGuide
 - Ontario.ca/ESAforms
 - Termination Tool: Ontario.ca/ESAtools
 - Vacation Time and Pay: Ontario.ca/vacation
 - Multiple languages including Arabic, Hindi, Portuguese, Punjabi, Chinese, Tagalog, Thai and Urdu

Ministry of Labour Compliance Update

- August 2016: MOL announced recruiting 25 industrial inspector positions and 7 construction inspector positions
- Workplace violence fines:
 - August 2016: Kinark Child and Family Services fined \$125,000
 - July 2016: Centre for Addiction and Mental Health fined \$80,000

Employment Standards Case Law Update

- Employee vs. Independent Contractor
 - No universal test
 - The Board analyzes this issue by asking whether the person who has been engaged to perform the services is performing them as a person in business on his or her own account
 - The level of control the employer has over the worker's activities always will be a factor

Employment Standards Case Law Update

- Other factors:
 - Whether the worker provides his or her own equipment,
 - Whether the worker hires his or her own helpers,
 - The degree of financial risk taken by the worker,
 - The degree of responsibility for investment and management held by the worker, and
 - The worker's opportunity for profit
- Whether ... a person is an independent contractor is a question of law ... it is not a question answered decisively by any written agreement between the parties ...
(*Markovic v. 1756982 Ontario Limited*, 2015 CanLII 68892 (OLRB).)

Employment Standards Case Law Update

- Pregnancy / Parental Leave
 - Remedy: If not seeking reinstatement = full compensation until new job + job search expenses + damages for mental pain and suffering + damages for loss of expectation of continued employment – not awarded if genuine misunderstanding

(*Markovic v. 1756982 Ontario Limited*, 2015 CanLII 68892 (OLRB).)

Employment Standards Case Law Update

- Pregnancy / Parental Leave
 - Remedy:
 - All wages lost from termination until last hearing date when advised not seeking reinstatement
 - 2 weeks / year of service
 - Compensation for EI benefits lost
 - Emotional distress (\$5,000)
(*Lamoureux v. JYSK Linen N Furniture Inc.*, 2015 CanLII 78257 (ON LRB).)

Employment Standards Case Law Update

- Exemptions

- Accountants: s. 3.(1) Parts IV, V, VI, VII and VIII of the Act do not apply to a person employed (a) as a duly qualified practitioner of ... (x) public accounting
 - “Public accounting” is simply a reference to an accountant holding out his/her services to perform the normal accounting functions for members of the public. It is intended to be a reference to the accounting profession, not just to those accountants who are licensed to sign an audit or assurance agreement

(*Stan Seidenfeld Professional Corporation v Peng*, 2016 CanLII 26939 (ON LRB).)

Employment Standards Case Law Update

- Releases are binding
 - 5 factors to set aside based on misrepresentation:
 - Representations were made
 - Were false in fact
 - Were known or should have been known to be false
 - Induced applicant to enter into agreement to his / her prejudice
 - Within reasonable time of discovery of falsity, applicant elected to void agreement and accordingly repudiated it
(*State Street Fund Services Toronto Inc. v Cainamisir*, 2015 CanLII 9555 (ON LRB).)

Employment Standards Case Law Update

- Terminations for Cause
 - Contractual termination tweak:
 - Ensure that saving provision applies to entire clause, not just termination without cause

Changing Workplaces Review



- Interim Report of Special Advisors published July 2016
 - Received more than 200 submissions
 - Conducted dozens of public consultations
 - Identifies 50 issues and more than 225 options for *Labour Relations Act, 1995* and *Employment Standards Act, 2000*
 - Deadlines for submissions:
 - August 31, 2016 – personal emergency leave options
 - October 14, 2016 – all other issues and options

Changing Workplaces Review



- Definition of employee
 - Concern regarding misclassification
 - Recommend expanding responsibility in light of growing incidence of subcontracting, outsourcing, use of temporary help agencies, franchise arrangements

Changing Workplaces Review



- Exemptions
 - Currently 85 complex exemptions and special rules
 - Likely to recommend process of review to assess merits of exemptions, whether they should be modified or eliminated
 - Of particular concern:
 - IT professionals
 - Supervisors and managers
 - Interns and trainees

Changing Workplaces Review



- Hours of work and overtime pay
 - Will likely recommend:
 - Scheduling provisions requiring employers to provide notice of shift schedules
 - Changes with penalties if they do not do so

Changing Workplaces Review



- Statutory Holidays and Pay
 - Unlikely to recommend changes
- Paid Vacation
 - Likely to recommend increase to 3 weeks after 5 or 8 years

Changing Workplaces Review



- Personal Emergency Leave
 - Likely to recommend removal of small employer exemption or provide for different entitlements for different sized employers
 - Likely to be considered in conjunction with recommendation for paid sick leave

Changing Workplaces Review



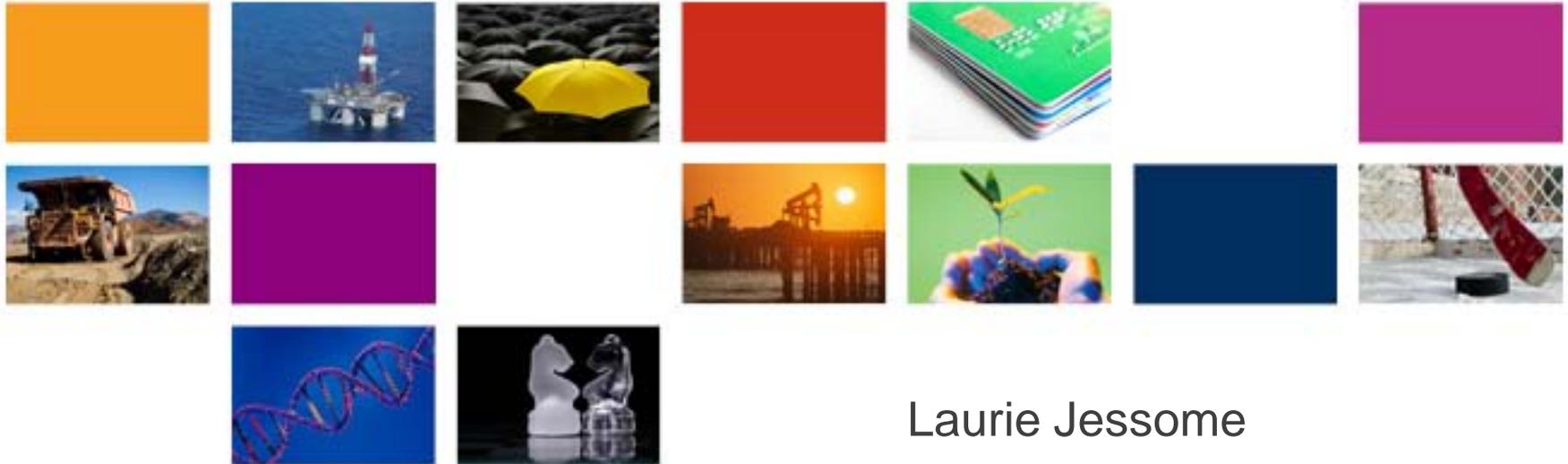
- Part-time and Temporary Work
 - Considering requirement to receive same compensation and benefits as full-time counterparts, subject only to differences in qualifications, skill, seniority, experience or other objective factors
 - Will likely recommend broad changes to temporary help agencies – considering cap on % of workforce that can be agency workers, disclose mark-up to workers

Changing Workplaces Review



- Compliance / Serious Enforcement Problem
 - 15,000 complaints made each year – 90% are from people who are no longer employed
 - MOL finds 70% of claims to be valid
 - Between 2011-2014 proactive MOL inspections found violations 75-77% of the time

Accommodation in Employment: Trends, Hot Topics and New Developments



Laurie Jessome
October 18, 2016
Breakfast Seminar

Purpose of Session



- To give an overview of significant HRTO decisions in last two years
- Review and discuss consistent themes in the decisions
- To discuss emerging issues in human rights at work

Human Rights and Accommodation at Work

- Every person in Ontario has the right to equal treatment at work without discrimination or harassment based on or related to a ground protected by the Ontario *Human Rights Code* (the “Code”)
- Protected grounds: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability

Human Rights and Accommodation at Work

- Covers every aspect of the working relationship
 - Applications and interviews
 - Recruitment and hiring
 - Training, transfers, promotions
 - Rate of pay, benefits, overtime, holidays
 - Hours of work and shift times
 - Discipline, dismissal and layoffs

Human Rights and Accommodation at Work

- Accommodation a key obligation for employers under the *Code*
- Employers must prevent and remove barriers
- Employers must provide accommodation restrictions related to *Code* grounds to the point of undue hardship

“Undue Hardship”



- Ontario Human Rights Commission takes the position that only three factors may be considered when assessing undue hardship:
 - Cost
 - Sources of outside funding
 - Health and safety
- Standard is very high
- Burden of proof is on the employer
- Procedural and substantive element

2014, 2015 and 2016 in Review



- Conducted a search for all HRTO employment decisions in Ontario in 2014, 2015 and 2016 to date
- Also conducted a review of any decisions discussing medical marijuana at work
- Reviewed for:
 - New trends
 - Notable outcomes
 - Recurring themes

No “Make Work” Projects



- HRTO has affirmed that employers do not have the obligation to create “make work” projects to accommodate employees with disability
- *Gahagan v. James Campbell Inc.*, 2014 HRTO 14
 - Gahagan worked in a McDonalds franchise in the grill area
 - After 9 years of employment suffered a back injury
 - Restrictions: standing for only 10 minutes, sitting for only 5 minutes, working for no more than 3 hours a day

No “Make Work” Projects



- Employer claimed it could not accommodate these restrictions because of the fast pace of work in the restaurant and the limitations of its small staff. Could not provide her with a “shadow” to assist her with her duties
- After 2 years of absence due to disability, Gahagan’s employment was terminated
- HRTO found that the employer did not have an obligation to hire an additional person to assist Gahagan with performing her duties and that doing so would have amounted to a “make work” role

Burden is on the Employer to Prove Undue Hardship



- *Zaromitidis v. Toronto Police Services Board*, 2014 HRTO 1296
 - Applicant had a hearing impediment
 - Passed five of the six tests in Stage 1 of the assessments required to be certified as a constable
 - Did not pass the hearing acuity test
 - Alleged that the test was discriminatory
 - Police Services Board took the position that passing the hearing acuity test was a bona fide occupational requirement (“BFOR”)

BFOR



- An job standard is a BFOR where:
 - It was adopted for a purpose or goal that is rationally connected to the function being performed
 - It was adopted in good faith and with a genuine belief that it was necessary
 - It is reasonably necessary to accomplish its purpose or goal in that the employer cannot accommodate persons with the characteristics of the claimant without incurring undue hardship

Burden is on the Employer to Prove Undue Hardship



- HRTO held that the hearing assessment test was discriminatory and was not a BFOR
- HRTO examined the tests in detail and heard expert evidence
- Found that the hearing test satisfied the first two steps of the BFOR test but not the third
- No evidence before the HRTO as to why these particular hearing standards were necessary to perform the tasks of a police officer in a safe and efficient manner

Burden is on the Employer to Prove Undue Hardship



- *Easthom v. Dyna-mig*, 2014 HRTO 1457
 - Easthom alleged discrimination on the basis of her disability when her employer declined to accommodate her request for a change to her shifts
 - Requested a straight day shift rather than a swing shift of two weeks from 7 am to 3 pm followed by two weeks of working 3 pm to 11 pm
 - Easthom's doctor advised that the change in shift would help her cope with her neck injury and fibromyalgia

Burden is on the Employer to Prove Undue Hardship



- Request for shift changes denied by the employer primarily because it would result in complaints of unfairness from other employees
- HRTO rejected this as a ground for establishing undue hardship
- Employer did not provide evidence that it could not accommodate the changes in light of its production needs

Mental Health, Addiction and Non-visible Disabilities



- Mental health and intellectual disabilities present particular challenges for employers
- Often invisible
- Often result in behaviour that would typically attract disciplinary action

Mental Health, Addiction and Non-visible Disabilities



- *MacLeod v. Lambton (County)*, 2014 HRTO 2014
 - MacLeod the Manager of Emergency Medical Services at Lambton County
 - Suffered from bipolar disorder
 - After 2 years of employment with some performance issues, went on leave disability leave
 - During his leave, other employees came forward to allege that he had been verbally abusive to them. Included threats of vengeance toward employees he felt had wronged him and sexual advanced to someone who reported to him

Mental Health, Addiction and Non-visible Disabilities



- Two attempts to return to work. On both occasions, he was assigned to non-managerial duties
- Employer also asked MacLeod to respond to issues regarding his performance and abusive behaviour
- MacLeod advised that the verbal abuse was related to his bipolar disorder. MacLeod went on leave again and brought human rights application
- Employer completed investigation into allegations of verbal abuse and performance issues. Did not consider whether bipolar disorder played a role. Determined MacLeod would not return to managerial role

Mental Health, Addiction and Non-visible Disabilities



- HRTO found it was reasonable for the employer not to return MacLeod to his managerial role while it was investigating the alleged verbal abuse and MacLeod was receiving treatment for his bipolar disorder
- However, the decision that he could never be returned to that role was discriminatory
- Most, if not all, of the incidents of inappropriate behaviour were linked to bipolar disorder, which was under control at time of hearing

Mental Health, Addiction and Non-visible Disabilities



- Once MacLeod advised the employer of his bipolar disorder, it had a positive obligation to find out more and take that evidence into account when evaluating the allegations of misconduct
- Ordered reinstatement despite the fact that MacLeod continued to make disparaging comments about the employees who complained about his conduct – even during the hearing itself
- Also received lost wages and \$25,000 in general damages

Mental Health, Addiction and Non-visible Disabilities



- *Gaisiner v. Method Integration Inc.*, 2014 HRTO 1718
 - Gaisiner fired after 3 months of employment
 - Employer argued that he was fired because of poor skills and technical ability
 - Gaisiner took the position that the termination of his employment was related to his ADHD
 - Gaisiner disclosed his ADHD to his manager early in the employment relationship
 - Manager Googled how to work with people with ADHD

Mental Health, Addiction and Non-visible Disabilities



- HRTO accepted that Gaisiner's difficulties with his role were related to his ADHD
- HRTO found that the employer had discriminated against Gaisiner by failing to properly consider accommodation options for him
- Googling ADHD was unreliable and insufficient
- Should have met with Gaisiner and asked him to have his doctor provide information about his accommodation needs

Mental Health, Addiction and Non-visible Disabilities



- *McLean v. Riverside Health Care Facilities Inc.*, 2014 HRTO 1621
 - McLean an RN who stole a patient's medication and ingested it while on duty
 - Admitted the theft and misuse and resigned
 - Later brought an application to the HRTO alleging that her theft was a result of her addiction to alcohol

Mental Health, Addiction and Non-visible Disabilities



- HRTO noted that for McLean to establish discrimination she had to satisfy the Tribunal that the “discipline and/or dismissal resulted from misconduct that was *causally related* to the applicant’s addiction”
- HRTO also noted that McLean did not attribute the theft to her addiction during the course of her employment or at the time of her resignation

Mental Health, Addiction and Non-visible Disabilities



- HRTO found no discrimination against McLean
- The employer had no knowledge of her disability at the time it responded to the incident and she did not raise it as an issue
- Further, McLean’s “misuse” of the prescription medication was not, in itself, an addiction or a disability
- No causal relationship between misconduct and addiction

Family Status and Employment



- *Wing v. Niagara Falls Hydro Holding Corporation*, 2014 HRTO 1472
 - Wing a municipal counsellor who sat on the Board of the Hydro corporation as part of her duties with the municipality for which she received an honorarium
 - Board changed its meeting times to earlier in the business day and instituted a rule that any director who missed two consecutive meetings would be removed from the Board
 - Wing alleged that these changes were discriminatory in that she was unable to make the new meeting times because they interfered with her ability to pick her child up after school

Family Status and Employment



- At the time she initiated the application, Wing had missed every meeting that year for various reasons, only one of which was a parental obligation
- When Wing raised concerns about the changes, the Board offered two accommodations:
 - She could attend by phone
 - Arrangements would be made for there to be child care available at the corporation while she attended the meeting
 - Wing declined both

Family Status and Employment



- HRTO ultimately found Wing was not actually an employee
- Even if she had been, no discrimination
- Childcare activities that are protected by the *Code* are only those that engage the parent's legal responsibility to a child
- Four part test

Family Status and Employment



1. That a child is under the individual's supervision;
2. That the childcare obligation at issue engages the individual's legal responsibility for the child, as opposed to personal choice;
3. That the individual has made reasonable efforts to meet those obligations through reasonable alternative solutions and no such alternative solution is reasonably accessible; and
4. That the impugned workplace rule interferes in a manner that is more than trivial with the fulfillment of the childcare obligation.

Family Status and Employment



- Wing's obligation to pick her daughter up from school and bring her to swimming lessons was a personal choice, not a legal responsibility
- No discrimination

Family Status and Employment



- *Miraka v. A.C.D. Wholesale Meats Ltd.*, 2016 HRTO 41
 - Miraka a truck driver
 - Missed three consecutive days of work: two to care for his children while his wife was ill, then a third because of personal illness
 - When he returned to work, his employment was terminated
 - He alleged it was punishment for attending to his family care obligations

Family Status and Employment



- Employer took the position that it had terminated Miraka's employment because he had failed to provide appropriate advance notice of the continued absences
- Miraka did not call in before missing the second day of work
- He had been employed for approximately one month at the time of his absences

Family Status and Employment



- HRTO found that the employer had discriminated against Miraka by terminating his employment
- The absences were related to *Code* protected grounds, family status and disability
- The absences to care for his children engaged his legal responsibilities in that his wife was unable to provide proper care
- Unreasonable to expect him to arrange for alternative child care on such short notice and to deal with a sudden and unexpected occurrence

Emerging Issues



- Miscarriage as a disability
 - *Mou v. MHPM Project Leaders*, 2016 HRTO 327 – Employee had a miscarriage, following which her attendance and performance declined. Argued that her miscarriage was a disability and the employer ought to have linked her performance and attendance issues to it
 - Interim decision, not final. But HRTO has now definitively held that miscarriage can be a disability

Emerging Issues



- Medical marijuana
 - No Ontario decisions yet
 - In a decision of the BC Human Rights Tribunal it considered whether an employer could terminate the employment of an employee who admitted to marijuana use on the job after an auto accident onsite. Employee was self-prescribing marijuana for a pre-existing condition. No prescription
 - Held to be undue hardship for an employer to accommodate an employee in a safety sensitive position who was illegally using marijuana, even if it was related to his disability

Emerging Issues



- Medical marijuana
 - Two Alberta arbitration decisions also consider the issue
 - In one, the failure of an employee to disclose his marijuana use to the employer was deemed to be a violation of the drug and alcohol policy, even though he had a valid medical prescription
 - In the other, an employer was found to have discriminated against an employee in a safety-sensitive position when it removed him from duty after finding out he was a medical marijuana user

Emerging Issues



- Medical marijuana
 - Employee had notified two supervisors of his use and they allowed him to continue without notifying their own managers
 - Investigation was thus delayed and tainted
 - Arbitrator also took note of the fact that there was no evidence that the marijuana use interfered with the employee's ability to perform his duties safely

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Questions?

