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Employment Notes

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"The Reasons for Judgment and resulting fines have been the basis for much debate. Some argue that the penalty was harsh, while others suggest it was far too lenient..."

THE CONTINUING SAGA OF METRON CONSTRUCTION

Melanie I. Francis

In our February 2012 Employment Update we highlighted the case of *R v. Metron Construction Corporation* as one to watch for the severity of the penalty imposed under the Bill C-45 amendments to the *Criminal Code*. There have now been some recent developments in this case.

In June 2012, Metron plead guilty to criminal negligence causing death under the *Criminal Code*. The Reasons for Judgment with respect to sentencing were released on July 13, 2012. In total, Metron, and its President, Joel Swartz, were fined over $300,000, when the criminal sanctions are combined with the regulatory penalty already imposed on Mr. Swartz.

The Reasons for Judgment and resulting fines have been the basis for much debate. Some argue that the penalty was harsh, while others suggest it was far too lenient and that jail time or a significantly higher fine should have been imposed. This debate is destined to continue for some time because on August 13, 2012 the Crown filed a Notice of Application for Leave to Appeal and Notice of Appeal. In this article, we consider the impact of the Reasons for Judgment and the potential consequences of the appeal.

Background

On Christmas Eve 2009, four workers fell 14 stories to their deaths, when their swing stage collapsed. None of the workers were secured with the proper fall protection. One of the deceased was Metron's Site Supervisor on the project. A fifth worker also fell but survived, suffering serious injuries. A sixth worker was properly attached to a safety line which prevented him from falling.

Following an investigation, charges were laid against Metron and Mr. Swartz. Metron entered a guilty plea to a count of criminal negligence causing death and the parties agreed to specific facts to support such a finding. Specifically, the parties agreed that the Site Supervisor met the definition of a senior officer of Metron and that through his acts and omissions Metron had failed to take reasonable steps to prevent bodily harm or death by:

a) directing or permitting six workers on the swing stage when it was known or should have been known it was unsafe to do so;

b) directing or permitting six workers to be aboard the swing stage knowing that only two lifelines were available; and

c) permitting persons under the influence of drugs to work on the project.

Metron pleaded guilty to criminal negligence pursuant to sections 22.1(b), 217.1 and 219 of the *Criminal Code*.

Lower Court Decision

In considering the appropriate sentence for Metron, Justice R. Bigelow noted that there was lit-

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tle case law upon which to rely as a guide. As previously noted, prosecutions under the Bill C-45 amendments made in 2004 have been extremely rare. Justice Bigelow therefore looked mainly to the general principles of sentencing, both under the *Criminal Code* and under Ontario's *Occupational Health and Safety Act*, to determine the appropriate penalty.

In terms of mitigating factors, Justice Bigelow specifically noted:

a) Metron had no prior record for violations of either criminal or regulatory legislation;

b) Metron was likely unaware that its security system had been neutralized at the time of the accident;

c) After the accident Metron expended significant funds on occupational health and safety improvements;

d) Metron was a family run corporation employing up to 100 individuals and was already in a precarious financial position;

e) There was no advantage to Metron as a result of the offence;

f) The Crown did not establish any attempt by Metron to hide or convert assets in order to reduce any fine that might be imposed or to avoid payment of restitution;

g) Metron had entered a guilty plea thereby substantially reducing the costs of a public prosecution;

h) Metron's President had already entered a guilty plea to violations of the Regulations of the *Occupational Health and Safety Act*, and a substantial fine totalling over $100,000 had been imposed; and

i) Neither Metron nor its President had previously been convicted of similar offences or sanctioned under the *Occupational Health and Safety Act*.

Justice Bigelow imposed a fine of $200,000 plus a victim surcharge of $30,000. Justice Bigelow determined that this amount, combined with the fine imposed on Mr. Swartz, was three times the net earnings of the business in its last profitable year and would send a clear message about the importance of ensuring worker safety.

Appeal

In its Notice of Appeal, the Crown states that the sentence imposed by Justice Bigelow is manifestly unfit. The Crown states that Justice Bigelow erred in the assessment of the appropriate sentencing range and that the penalty imposed did not sufficiently reflect the high degree of culpability for a criminal conviction.

Lessons for Corporations and Officers

We are a long way from knowing whether the Court of Appeal will agree with the Crown's appeal arguments. In the interim, the debate regarding Metron's sentence and the efficacy of the Bill C-45 amendments more generally will continue. As this debate goes on, and while we await an ultimate determination on appeal, there are some points to take from the Metron case so far.

Most importantly, corporations should be aware that they can be held criminally responsible for the actions of mid-level managers such Metron's Site Supervisor. In fact, the Crown need not prove that the "senior officer" referred to in the applicable *Criminal Code* provisions is a directing mind of the corporation. Remember, the conduct that formed

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the basis of Metron's criminal liability was solely that of its Site Supervisor. Corporations must therefore be cognizant that the actions of just one site supervisor can negate all the positive steps taken by a corporation with respect to health and safety, and can result in criminal liability.

It follows that the importance of selecting qualified managers and supervisors cannot be overstated. Proper training of these designated individuals is essential to protecting the health and safety of workers, and to protecting organizations from liability.

The fines imposed on Mr. Swartz were the largest ever against an individual convicted under Ontario's *Occupational Health and Safety Act*. Similarly, the fine imposed on Metron was the largest ever for a criminal negligence conviction based on health and safety violations. Although some workplace safety advocates remain dissatisfied with these penalties, it is possible that we are starting to see a shift towards heftier penalties for health and safety violators. Certainly, there seems to be a movement on the part of the Crown towards higher penalties, considering the $1,000,000 fine that was sought for the *Criminal Code* violation, and the appeal that has since been filed.

Corporations, and their directors, must be vigilant with respect to their health and safety obligations. Such vigilance is required to protect those whom they employ, which is the most important consideration by far, but also to avoid facing penalties that may now have a very significant impact on their bottom line. ■

LATEST WORD ON TWO-TIERED UNION INITIATION FEES

Elizabeth J. Forster

Many building trades' unions operating in the construction industry in Ontario have a two-tiered membership initiation fee. Under the two-tiered system, there is a usually lower initiation fee for those who join the union as a result of a union's organizing campaign and a higher initiation fee for all other people who join the union. People who join the union as a result of an organizing campaign are usually not asked to pay the initiation fee unless the union is actually certified.

The Ontario Labour Relations Board recently examined this practice in the decision of *Graham Bros. Construction Ltd. v. LIUNA*. In this case, Labourers' International Union of North America applied for certification of a group of labourers employed by Graham Bros. Construction Ltd. The application involved many days of hearing before the Board.

In the course of the proceedings, it came to the attention of the employer that there may have been some irregularities in connection with the signing of the union membership cards. Some of the employees alleged that at the time they were approached by a LIUNA representative they were told that if they signed a membership card during the organizing campaign, they could join the union for $50. If, however, they did not, they would have to pay a larger amount in order to keep working for their employer once the union was certified.

The Board noted the following in connection with the collection of membership cards:

1. The Board requires a high standard of integrity on the part of union officers in the soliciting,

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gathering and presentation to the Board of membership evidence;

2. A union officer is under a duty to refrain from making false or misleading statements in the course of an organizing campaign;
3. A union must make the lower initiation fee available to all employees of the employer who are employed at the time of certification, not just those who sign a membership card;
4. Union representatives must not leave an impression with employees that if they do not sign a membership card when asked they will be charged a higher initiation fee.

The Board held that the comments made by one of the LIUNA organizers cast doubt upon the reliability of all of the membership evidence filed in support of the application because the Board was unable to determine whether the employee signed the card because the employee wanted to join the union or rather because the employee wanted to avoid the potential of having to pay a higher amount later.

It was submitted at the hearing that only the membership cards of those who gave evidence to the effect that they received this representation should be discounted. The Board rejected this submission and said that given that the comments were made to at least some employees, it was unclear as to how many employees were aware of the statements and had joined the union as a result of those statements.

In order to remove the doubt as to who wished to join the union, the Board directed a representation vote amongst all employees in the bargaining unit. ■

AN UPDATE ON THE DUTY TO ACCOMMODATE

Maria Kotsopoulos

Some recent arbitration decisions dealing with the duty to accommodate highlight the interplay between the various workplace parties in the development of an individual's accommodation plan. These cases affirm that meaningful participation is required by all workplace parties. The employer, the employee and the union must cooperate in the process with the ultimate aim being an employee's successful return to work where possible. From time to time, other employees in the bargaining unit will also be impacted in the accommodation process.

A Refresher on the Duty to Accommodate:

The *Human Rights Code* (the "Code") entitles people to equal treatment with respect to employment without discrimination because of any of the enumerated grounds. Arising from this entitlement is the duty and the related right to be accommodated in one's position. In some instances, the duty to accommodate requires employers to alter the terms of employment or the conditions of the workplace in order to enable an employee to perform the essential functions of his or her job. The duty to accommodate recognizes that each person's needs will be different and unique. As such, each case must be assessed individually and, where reasonable, an accommodation provided that permits the individual to perform or fulfill the essential duties or requirements of his or her employment short of undue hardship. Where an individual is incapable of fulfilling the essential duties or requirements of his or her job, however, a failure to accommodate the employee's needs may not breach the *Code*.

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Recent Statements on the Duty to Accommodate:

Employees Must Participate in the Accommodation Process

In *Star Choice Television Network Inc. v Tatulea* (February 2012) the dismissal of an employee was upheld by an arbitrator under the *Canada Labour Code*. The basis for doing so included the employee's failure to participate in the accommodation process.

Mr. Tatulea started work with Star Choice in April 2008 as a Customer Service Agent. At the end of 2009, he took time off work and requested leave with pay due to neck pain and cervical strain. His physician had recommended a three week leave of absence. Mr. Tatulea filed a claim with the Commission de la Santé et de la Securité au Travail in Quebec and applied for short term disability benefits. Both claims were denied. The employer, however, recommended and offered to provide accommodation to Mr. Tatulea in his position on two separate occasions.

Upon further communications from the employee's physician recommending another leave of absence and the employee's claim for long term disability benefits, the employer continued its attempts to communicate with Mr. Tatulea in order to facilitate his return to work. At Star Choice's request, Mr. Tatulea agreed to see a physiatrist who diagnosed him with fibromyalgia. Upon being advised that his failure to cooperate could result in termination, Mr. Tatulea then agreed to be examined by specialists. Star Choice recommended and offered Mr. Tatulea a six week program of accommodation to facilitate his successful return to work, which included physiotherapy and occupational therapy, as well as reduced and modified hours of work. Mr. Tatulea attended on the first day but left and ultimately refused to participate in any part of the accommodation plan. He also ceased communications with Star Choice. The employer tried to discuss with Mr. Tatulea his return to work on subsequent occasions, but he would not participate in these discussions. Star Choice terminated his employment.

In discussing the duty to accommodate, the arbitrator found that Star Choice had made numerous requests and reasonable attempts to "originate a solution" and facilitate the employee's return to work through offers of accommodation, but that the employee did not live up to his part of the bargain "to assist and cooperate" [paragraph 44]. In ultimately upholding the termination, the arbitrator concluded that Mr. Tatulea provided no valid reason for his refusal to cooperate or communicate with his employer's reasonable accommodation plan.

Employees Must Ask For and Require Accommodation

In *Canadian Mental Health Association v the Ontario Public Service Employees Union Local 133* (February 2012) the Union grieved the termination of probationary employee with epilepsy on the basis that her termination was discriminatory and in contravention of the collective agreement. In ultimately dismissing the grievance, the arbitrator commented upon the content of the employer's obligation to accommodate.

The grievor started work with the Association in a contract crisis response position as a crisis worker. Her contract included a probationary period. Subsequent to her hire, and following various meetings at which the grievor received feedback on her performance, the grievor disclosed that she had a medical condition, namely epilepsy, and that she took medication from time to time. The employer acknowledged that it would attempt to provide accommodation to her, if it was required, specifically with respect to the length of her shifts. The

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Association advised the grievor that she should advise if accommodation was necessary at any time.

In cross examination, the grievor agreed that neither her epilepsy nor her medication had anything to do with any of the performance issues identified by the Association to her. She also confirmed that she did not ask for accommodation. Nonetheless, the grievance alleged that her termination was discriminatory on the basis that the Association did not give her a proper chance to demonstrate her ability to do the job with accommodation. On behalf of the grievor, the union submitted that the Association was in the best position to investigate and assess the grievor's needs and the potential accommodations which could be made available to her and that it was not up to the grievor to tell the employer what her needs where. In short, the union submitted that the employer simply did not do enough from a procedural perspective under either the collective agreement or the *Code*.

In addressing the issue of the employer's duty to accommodate, the arbitrator held that there was no evidentiary basis upon which he could conclude that it was more probable than not that the employer knew or reasonably ought to have known that the grievor had epilepsy before she disclosed it to her supervisor. Further, there was no evidence that she had experienced any seizures or displayed any symptoms which could reasonably have been attributed to epilepsy during her earlier volunteer periods with the employer. Ultimately, the arbitrator concluded, *in the context of the facts of this case*, that the employer was not required to investigate further after the grievor indicated that she did not need accommodation.

The Duty to Accommodate May Trump Seniority Rights

In *Chatham-Kent Professional Firefighters Association v The Municipality of Chatham-Kent* (June 18, 2012), an arbitrator considered the interplay between the duty to accommodate and seniority rights under a collective agreement and concluded that the duty to accommodate outweighed seniority rights with respect to a posted position.

In this case, the Association grieved the decision of the Municipality to deny an upcoming vacancy to the grievor. The grievor was the only proposed applicant to the position and he had passed the requisite exams for the position. However, prior to the posting, another employee had gone off on disability. In fact, the employer's evidence was that it was the only position in which this other employee could be successfully accommodated within the bargaining unit. The Municipality conceded during the course of the hearing that the grievor was qualified for the position and that in the normal course he would have been awarded the position but for the rights of the other employee under the *Human Rights Code* and the collective agreement. The Municipality argued that in the circumstances, the other employee's rights trumped those of the grievor to the position.

In discussing the interplay between seniority rights and the duty to accommodate, the arbitrator confirmed that an employer is neither required nor permitted in all cases to displace another employee in order to accommodate an employee with a disability. However, vacant positions are properly considered to be available for accommodation purposes and seniority rights may have to give way to the duty to accommodate in certain cases.

Conclusions

These cases illustrate the need for all parties involved in the accommodation process to work together to try and find a solution where possible.

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Whereas employers are required to "originate a solution", this process necessarily involves the employee. Employees must be forthcoming with information regarding their specific needs when requesting accommodation and employers must do what is possible to the point of undue hardship to allow the employee to fully participate in his or her employment. But, the employer and the employee are not always the only participants in the accommodation process. In some instances, the rights of other employees may be affected. While arbitrators have concluded that employers need not necessarily bump employees or create new positions, negotiated terms under a collective agreement, including seniority rights, may be weighed against the overarching duty to accommodate. The process involves careful consideration, appropriate information and meaningful discussion. ■

AN UPDATE ON THE OVERTIME CLASS ACTION CASES

Christopher McClelland

Three recent decisions have provided some clarification on the issue of class actions by employees for unpaid overtime. On June 26, 2012, the Court of Appeal for Ontario issued its decision in the cases of *Fulawka v. The Bank of Nova Scotia, Fresco v. Canadian Imperial Bank of Commerce* and *McCracken v. Canadian National Railway Company*. Each case dealt with the preliminary question of whether the action should be certified as a class proceeding. In effect, the Court was being asked to determine if representative plaintiffs should be permitted to pursue claims on behalf of hundreds or even thousands of employees. As such, the amounts at issue in these cases are potentially significant.

The Court ultimately decided that the actions against the Bank of Nova Scotia and the CIBC would be allowed to proceed as class actions, while the action against CN was not certified. The distinction between the two sets of cases related primarily to whether there was a common issue amongst the various groups of employees. In the bank cases, the Court found that the claims were about allegedly improper policies and practices; primarily that the banks implemented overtime policies that required or permitted employees to work uncompensated overtime hours. In contrast, the CN case was primarily about whether certain groups of employees had been misclassified as managers or supervisors, which made them exempt from being paid overtime. The Court found that determining this issue would require looking at the job functions of each employee individually, and that a class action was not the proper process for addressing this issue.

Given the history of these proceedings to date, it is likely that some or all of the unsuccessful parties will seek leave to appeal to the Supreme Court. As such, it may be some time before we know if these cases will be proceeding to trial. ■

THE *JOBS, GROWTH AND LONG-TERM PROSPERITY ACT* RECEIVES ROYAL ASSENT

Catherine Longo

Federal Bill C-38, the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c.19 received Royal Assent on June 29, 2012.

This omnibus Bill includes legislative changes to the *Employment Insurance Act*, the *Canada Labour Code*, the *Old Age Security Act*, the *Canada Pension Plan*, the *Wage Earner Protection Act* and the *Employment Equity Act*. These changes will implement various provisions of

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the most recent federal budget, including amendments to the *Old Age Security Act* and the Wage Earner Protection Program.

The amendments to the *Old Age Security Act* provide that from April 2023 to January 2029, the age of eligibility for old age security and guaranteed income security benefits will gradually increase from 65 to 67 years of age.

The Wage Earner Protection Program will have an additional $1.4 million dollars allocated to it each year for the purpose of speeding up the processing of claims under the program. ■

NEW POSTING REQUIREMENTS FOR THE WORKPLACE IN EFFECT AS OF OCTOBER 1, 2012

Catherine Longo

In our June Employment Update we noted that the Ministry of Labour has introduced a new mandatory health and safety workplace poster, "Health & Safety at Work - Prevention Starts Here". This poster must be posted in the workplace starting October 1, 2012. It can be found on the Ministry of Labour website here:
www.labour.gov.on.ca/english/hs/pubs/posterinfo.php

The purpose of the posting is to set out the health and safety rights and responsibilities of workers as well as the responsibilities of employers and supervisors. Workers and employers are reminded that workers are protected from reprisal for raising health and safety concerns in the workplace or for acting in compliance with the *Occupational Health and Safety Act*. ■

Employment Notes is a publication of the Employment and Labour Law Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Kylie Aramini at 416 593.7221 ext. 3600 or by email to karamini@blaney.com. Legal questions should be addressed to the specified author.

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