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Employment Notes

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EMPLOYER LIABLE FOR HARM TO INTOXICATED EMPLOYEE

Hunt v. Sutton Group Incentive Realty

An Ontario Court judge has recently found an employer partially responsible for injuries suffered by its part-time receptionist when she became intoxicated at the employer's afternoon office Christmas party. The employee was asked to answer the telephone and clean up after the party. However, as the afternoon progressed, it became apparent to her supervisor that she had overindulged and he offered to call her spouse to drive her home. The employee refused the offer and continued to drink at the party and later accompanied co-workers to a nearby pub. After consuming more alcohol at the pub, the employee attempted to drive home in a snow storm and was severely injured when her car slid down an icy hill and collided with a truck. The employee suffered permanent brain injury as a result of the accident. The employee sued her employer for damages claiming that her employer failed to properly safeguard her from harm.

The trial Judge held that the employer had a duty to safeguard its employees from harm during the course of their duties and while on the employer's premises. This duty required the employer to make sure its employee would not become so intoxicated such as to interfere with her ability to drive. The Judge found the employer ought to have foreseen the possibility of harm to its employee created by the combination of the bad weather and her intoxicated state and should have taken positive action to prevent her from driving.

The employee was found to be contributorily negligent to the extent of 75% of her damages. However the employer was held liable for 25% of her damages which amounted to approximately $300,000.

This case offers important lessons for employers to ensure the safety of employees at company events and to reduce the risk of liability. Before the next office party consider:

• limiting the availability of alcohol at events;

• employing trained bartenders to dispense alcohol;

• assigning someone to monitor employee behaviour throughout the event and prior to the employees' departure from the event;

• issuing taxi or hotel vouchers to employees attending the event; and,

• confiscating employee's car keys or advising the police if employee insists on driving while intoxicated.

Lisa Bolton

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"Ontario's Bill 59, the Automobile Insurance Rate Stability Act, ...may have some effect on potential exposure of employers."

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INCREASED DAMAGE EXPOSURE FOR EMPLOYERS IN MOTOR VEHICLE ACCIDENT LITIGATION

Ontario's Bill 59, the Automobile Insurance Rate Stability Act, 1996, which divides defendants into two classes, namely "protected defendants" and "other persons" (unprotected defendants) has recently been judicially considered and may have some effect on the potential exposure of employers.

Protected defendants are the owners of involved automobiles, their occupants (including drivers) and persons present at the incident (for example a police officer directing traffic). Bill 59 contains several significant damage reduction provisions which only benefit protected defendants. The first such provision limits a protected defendant's exposure for damages for pain and suffering to situations where the injury causes the plaintiff to suffer a permanent, serious impairment of an important bodily, mental or psychological function. A second provision reduces any pain and suffering damage award by $15,000.00. A third eliminates a protected defendant's liability for health care expenses except where the plaintiff has suffered a so-called catastrophic impairment. The most significant of these mechanisms, however, is one which reduces a protected defendant's liability for pre-trial loss of income claims to 80% of the plaintiff's net loss of income. Unprotected defendants, according to one recent decision, are liable for all of these often significant damages that protected defendants are insulated from paying (the "excluded damages").

In November a trial judge concluded that employers are vicariously liable for all damages caused by their employees who are protected defendants. They are to be treated as unprotected defendants in many of these cases. This will render them liable for the so-called excluded damages. However, the court also decided that if the employer was also the owner of the involved vehicle, then the employer was to be treated as a protected defendant and would not be liable for the excluded damages.

Presently, it is impossible to be categorical about the exposure of employers under Bill 59. It would appear that the "vicarious liability strategy" will work where the employer does not own the involved vehicle. Such as the case where an employee is driving his or her own automobile. The court's conclusion that the employer is shielded from liability for the excluded damages if it also owns the involved vehicle will likely be challenged in other cases. There is a reasonable chance that this aspect of the decision will be overturned. It is unclear whether employers will be liable for all of the excluded damages or only a portion of them. The case which decided they are liable for all excluded damages is under appeal.

What are the practical implications of these developments? A significant proportion of the damages in motor vehicle liability actions may be shifted from other defendants to the employers of at-fault "protected" employees. Employers should ensure that they have the

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proper insurance coverages in place and that they have sufficient liability limits. If employees drive their own cars it is essential that employers have non-owned automobile insurance coverage. Of course, they must have coverage on all vehicles they own or lease. The types and amounts of coverage should be discussed thoroughly with your insurance broker.

Stephen Moore

EXPANSION OF HUMAN RIGHTS PROTECTION

In its November, 2000 decision in *B. v. Ontario (Human Rights Commission)*, the Ontario Court of Appeal considered the human rights protection afforded to persons who have suffered discrimination in employment on the basis of marital status and family status.

Mr. A was a 26 year employee with a spotless work record who was four years away from a full pension. His employer, Mr. B, was his wife's brother. Mr. A's wife and daughter confronted Mr. B with an allegation that he had sexually assaulted the daughter many years before. Believing that Mr. A shared his wife's and daughter's views, Mr. B. came to the conclusion that Mr. A's future loyalty to his employer was in doubt and dismissed Mr. A from the company.

Mr. A launched a successful human rights complaint which was overturned by the Divisional Court. The standard applied in the Court's analysis was whether Mr. A belonged to a group of people discriminated against because they are married or unmarried or have children. In Mr. A's case, his employer's actions flowed from the personal animosity created by the accusations of his wife and daughter.

He pursued the matter to the Ontario Court of Appeal which found in his favour. Madam Justice Rosalie Abella pointed out that the employer had no reason to believe that Mr. A shared his wife's and daughter's views other than the link between them as husband and wife or father and daughter. The only reason for his dismissal was the allegation of sexual assault against Mr. B. by members of Mr. A's family. Limiting the interpretation of prohibited grounds to the narrow approach taken by the Divisional Court would deprive the categories of their full remedial capacity and be contrary to the liberal approach which should be taken by the courts.

The results are a significant expansion in Ontario of the definition of discrimination on the grounds of family and marital status to include the drawing of an unfounded connection between the actions of a family member and the individual, and a clarification that individuals need not be artificially slotted into disadvantaged groups to find shelter under the Human Rights Code. The question is quite simply: has the person been discriminated against on the basis of a prohibited ground?

Chris Ellis

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"The Court found that a probationary period is not implied by law and exists only on the circumstances of each case."

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IS A PROBATIONARY PERIOD REALLY PROBATIONARY?

In a recent decision in the Ontario Superior Court of Justice, a Judge has found that a "probationary period" identified in an offer of employment did not give the employer the right to terminate the employee on two weeks' notice.

In *Easton v. Wilmslow Properties Corp.*, a decision rendered February 9, 2001, the employer provided an offer of employment to the employee which included the following provision: "probationary period: 90 days from start date". The offer also provided that the employee's salary would increase from the starting rate to a greater rate "upon successful review and completion of the outlined duties" and that "failure to completely and satisfactorily fulfil the prescribed duties will result in renegotiation of the salary structure."

The Court found that a probationary period is not implied by law and exists only in the circumstances of each case. In this case, the Court stated that the probationary period described in the offer was ambiguous and did not spell out the fact that the employee had to demonstrate her suitability for employment as a permanent employee and that she had to complete that assessment. As a result, the employer was found to owe reasonable notice to the employee upon her termination in the amount of three months.

As a result of this decision, it would be prudent to ensure that any offers of employment specifically outline the obligations of the employer upon termination of an employee inside of the probationary period.

If you wish us to review your standard language or wish to review a copy of this decision, please contact us.

Kevin Robinson

BLANEYS NEWS

We are pleased to announce that Christopher J. Ellis has joined the firm's Labour and Employment Law Group following his completion of the Bar Admission Course.

Chris can be contacted by telephone at 416.593.3954 or by e-mail to cellis@blaney.com

Chris grew up in Atlantic Canada and Ottawa. He graduated with a B.A. from Dalhousie University and obtained his LL.B. from Queen's University. Chris' practice focuses on labour and employment, estates litigation and health law. Chris is a member of the Canadian Bar Association, and the Advocates' Society. He sits on the Dean of Law's Advisory Council at Queen's University.

Employment Notes is a publication of the Labour and Employment 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 Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

EXPECT THE BEST

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