SEPTEMBER 2011

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Employment Notes

Employment and Labour Group

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"The Integrated Regulation outlines fairly significant new standards that will apply to public and private sector organizations and will require compliance by stipulated dates depending upon the nature and size of your organization."

NEW INTEGRATED ACCESSIBILITY STANDARDS IN COMMUNICATIONS, EMPLOYMENT AND TRANSPORTATION NOW IN FORCE: READYING YOUR ORGANIZATION

Maria Kotsopoulos

In our Employment Update in April of this year, we advised you about the requirements of Ontario's Accessible Customer Service Standards under the *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA").

In July 2011, the Integrated Accessibility Standards Regulation (the "Integrated Regulation") under the AODA came into force. It outlines new accessibility standards in three main areas: (1) information and communications; (2) employment and (3) transportation. The Integrated Regulation is meant to be read in conjunction with and does not replace or limit any requirements or obligations owed to individuals with disabilities established under the *Human Rights Code* or other legislation.

The Integrated Regulation outlines fairly significant new standards that will apply to public and private sector organizations and will require compliance by stipulated dates depending upon the nature and size of your organization.

For the purposes of this review, we will focus on the requirements for small and large private sector organizations. Under the Regulation, a "large organization" is defined as having 50 or more employees in Ontario and a "small organization" is one with fewer than 50 employees in Ontario.

Information and Communications Standards

The standards relating to Information and Communications generally require obligated organizations to:

- ensure processes for receiving and responding to feedback are in a format accessible to persons with disabilities and that there are appropriate communications supports;
- notify the public of the existence of these formats and communications supports and provide them to persons with disabilities in both a timely manner and at no greater cost than the regular cost charged to other persons; and
- consult with the person making the accessibility request to ensure the suitability of the accessible format or communications supports.

Websites and Web Content

The Integrated Regulation deals specifically with website and web content. Large organizations will be required to make websites and web content conform with the World Wide Web Consortium Web Content Accessibility Guidelines.

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"...the requirements of the Integrated Regulation are to be accomplished by large organizations by January 1, 2014 and by small organizations by January 1, 2015."

Maria Kotsopoulos practices with Blaney's Labour and Employment Group in all areas of labour, employment and human rights law.

Maria advocates on behalf of employers, not for profit organizations, trade unions, and employees, and has been involved in matters before the Superior Court of Justice, the Federal Court, the Labour Board, the Human Rights Tribunal, the Workplace Safety and Insurance Appeals Tribunal, and other tribunals.

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For large organizations, new internet websites and web content on those sites must conform with the guidelines by January 1, 2014. Subsequently, all internet websites and web content must conform with the guidelines except for certain specifically excluded criteria by January 1, 2021.

Employment Standards

Unlike the Customer Service Standards, the Employment Standards apply to employees only and not to volunteers or other non-paid individuals.

The Employment Standards will require organizations to:

- develop and notify employees and members of the public of the availability of accommodation for applicants with disabilities in an employer's recruitment processes;
- notify applicants who are individually-selected to participate in the employer's assessment or selection processes that accommodations are available upon request and to notify successful applicants of policies dealing with accommodation;
- consult with employees and provide employment policies and information needed to perform the job in accessible formats and provide communications supports as required;
- in the case of a large organization, develop and have in place a written process for the development of accommodation plans for employees with disabilities. This process must include a number of prescribed items, including a description of how the employee requesting accommodation can participate in the development of the individual accommodation plan;
- in the case of a large organization, develop and document a return to work process for its employees who have been absent from work due to disability and require disability-related accommodation(s) in order to return to work;
- take into account the accessibility needs of employees with disabilities as well as individual accommodation plans when using its performance management processes, providing career development and advancement and considering re-deployment.

Transportation Standards

There are many new transportation accessibility standards relating to the availability of accessible information and in relation to equipment, emergency preparedness and response policies, fares for support persons and the responsibilities etc. of transportation service providers.

Compliance

Part V of the Integrated Regulation provides for compliance mechanisms applicable to both this Regulation and the Accessibility Standards for Customer Service Regulation.

There are specific provisions in place regarding the amount of any administrative penalty that can be imposed by the Director. The grounds for the imposition of such administration penalty and the quantum is to be determined by severity of impact, contravention history and the nature of the entity be subject to the fine.

There are definitions for minor, moderate and major issues in respect to the severity of impact and contravention history.

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"...restrictive covenants are presumed to be unenforceable... because one of the core tenets of our legal system, and economy, is that there should be no unreasonable restraints on trade."

David Greenwood has represented clients in files involving wrongful dismissals, constructive dismissals, human rights complaints, pension issues, disability claims, allegations of employee fraud, theft of confidential and proprietary information, breach of fiduciary duties and misappropriation of corporate opportunities. Additionally, David is frequently consulted in respect of reorganizations and mass terminations and is routinely retained to draft or to negotiate employment agreements, employee policy manuals and other employment related contracts.

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The maximum fine imposed for a corporation is $100,000 and in the case of an individual or unincorporated organization the maximum fine that may be imposed is $50,000.

Timing

Subject to any specifically or separately-mandated provision in the Integrated Regulation, the requirements of the Integrated Regulation are to be accomplished by large organizations by January 1, 2014 and by small organizations by January 1, 2015.

A thorough reading of the new Integrated Regulation should be on everyone's end of summer reading agenda in order to ensure the road to compliance is well in hand.

If you have any questions about your organization's obligations or require assistance in developing and ensuring compliance with the Integrated Accessibility Standards, please contact us for assistance. ■

RESTRICTIVE COVENANTS: YOU SHOWED ME THE DOOR, AND NOW YOU WANT MY FIDELITY?

David Greenwood

Restrictive covenants, such as non-competition agreements, are a common way for employers to try to protect their interests against former employees. Unfortunately, on occasion the covenants provide less protection than the paper they are written on.

It must be remembered that restrictive covenants are presumed to be unenforceable. This is because one of the core tenets of our legal system, is that there should be no unreasonable restraints on trade. In order for the clause to be enforceable, the person or entity seeking to enforce the clause (usually the employer) must show that the clause is reasonably necessary to protect its legitimate business interests.

Earlier this year, the Ontario Court of Appeal was asked to consider the enforceability of a non-competition covenant. In *Mason v. Chem-Trend Limited Partnership*, the former employee, Mr. Mason, brought an application before the Court to determine whether and to what extent he was free to compete with his former employer. The non-competition clause at issue was for a period of one year following the end of Mr. Mason's employment and prevented him from engaging in "…any business or activity in competition with the Company by providing services or products to, or soliciting business from, any business entity which was a customer of the Company during the period in which [Mr. Mason] was an employee…"

The application judge found that the clause was reasonable and enforceable. Mr. Mason appealed. On appeal, the Court of Appeal found that there were other less restrictive ways in which the employer could (and in fact did) seek to protect itself. For example, the employment agreement included terms which restricted Mr. Mason's use of confidential information and which prevented him from soliciting customers of the Company. The Court of Appeal also found that the clause was not reasonable for a number of reasons including:

- its global scope was too broad notwithstanding that the Company operated globally;

"...it is a very good reminder that restrictive covenants, such as non-competition and non-solicitation agreements must be drafted with care."

- it was not restricted to preventing Mr. Mason from providing services or products to customers to whom Mr. Mason had knowledge of, but rather prevented him from providing services to any customers of the Company whether or not Mr. Mason knew that these entities were customers;

- Mr. Mason did not hold a senior position with the Company.

In the end, the Court of Appeal found that the clause was not reasonable and therefore was unenforceable. Clearly, this was a very unsatisfactory result for the Company. The result was even more painful to the Company as the clause at issue also contained the non-solicitation restriction. Since the clause was found to be unenforceable, the Company lost the protection of the non-solicitation clause as well as the non-competition clause.

This case is not unusual or remarkable. However, it is a very good reminder that restrictive covenants, such as non-competition and non-solicitation agreements must be drafted with care. These covenants should not be treated as boilerplate. They must be designed with regard to the interests the employer seeks to protect and the profile of the employee (things like the seniority of the position and the employee's access to confidential information or clients).

Practical Tips

Here are a few practical tips which should be considered when drafting restrictive covenants:

- make sure that the clause is reasonable and unambiguous as to the activities it restricts and its temporal and geographic scope. Keep in mind that the seniority of the position will have an impact upon the extent of the temporal and geographic limits. For example, courts are likely to enforce longer restrictive periods against senior employees, such as the CEO and other senior executives, as compared to less senior employees;

- make sure that the clause clearly identifies the clients with whom the employee is prevented from dealing. For example, rather than saying the employee is prohibited from soliciting or providing services to all clients of the company, limit it to clients with whom the employee has had contact during the last 12 months of employment;

- do not deal with non-competition restrictions and non-solicitation restrictions within the same clause. Separating the restrictions into different clauses will improve the chances that one restriction will survive if the other is found to be unenforceable;

- do not put restrictive covenants in the employment agreement or offer of employment. Attach them as schedules to the employment agreement or offer of employment. This makes it easier to amend the restrictive covenants in the future without affecting the balance of the terms of employment;

- review restrictive covenants every few years to make sure they are still enforceable. The law on this topic is not static and changes in the common law may make your existing agreements unenforceable;

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Melanie is a member of the firm's Employment & Labour and Election & Political Law groups.

Prior to entering the legal field Melanie spent time working with the Government of Ontario, first as a Legislative Intern and eventually as a Press Assistant to a Minister. Melanie articled with Blaney McMurtry in 2009-2010 and returned to the firm as an associate after her call to the Bar in 2010.

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- do not try to implement non-competition clauses if a non-solicitation clause and/or confidentiality clause is sufficient to protect the company's interests. Courts do not like it when companies try to over-reach in the restrictions imposed on departing employees.

If you have any questions about putting restrictive covenants in place or the enforceability of existing covenants, please contact us. ■

GREATER TORONTO AIRPORT AUTHORITY – UPDATE

Melanie I. Francis

Last year we told you about the decision of Arbitrator Owen Shime in *Greater Toronto Airports Authority v P.S.A.C., Local 0004*. In this decision Arbitrator Shime awarded a grievor in excess of $500,000.00 in damages – including damages for future economic loss and mental distress and punitive damages. At that time we queried whether the Divisional Court would vary the damages awarded when it considered the Greater Toronto Airport Authority's ("GTAA") application for judicial review. The decision on that review application has since been released, and as expected, damages were a significant issue addressed by the Divisional Court.

Recap of the Facts

The grievor was a 23 year employee of the GTAA. Her employment duties involved driving and a considerable amount of walking. Following a workplace injury the grievor went on modified duties until she underwent arthroscopic knee surgery. Post-surgery she provided the GTAA with a medical note authorizing her to be off work for four weeks. Unbeknownst to the GTAA, the grievor was living with another GTAA employee. This employee was under surveillance for suspected sick-leave abuse. In the course of this surveillance the grievor was observed being driven to a medical appointment by this other employee. Further surveillance of the grievor was undertaken and she was observed attending additional medical appointments and running errands. In light of this surveillance, the grievor was asked to produce additional medical documentation and to return to work early.

Although her doctor advised that the grievor should return to work on modified duties, upon her return she was not provided with modified duties and aggravated her knee injury. At a meeting called by the GTAA, the results of the surveillance were put to the grievor. She was given an opportunity to respond and then suspended indefinitely pending a final determination of her employment status. Upon review the GTAA determined it was not satisfied with the grievor's explanations and it terminated her employment on the grounds of dishonesty.

The grievor had an unblemished disciplinary record. However, during her career she had experienced significant trauma in her personal life, including mental, physical and sexual abuse by her former husband, stalking and death threats. The GTAA was aware of this, and in fact, at one point the grievor had taken a two month absence from work on account of a mental breakdown.

Arbitrator Shime's Decision

The grievor grieved her termination. She sought damages in lieu of reinstatement. Arbitrator Shime found that the grievor had been terminated without cause, saying that the grievor had dealt with her medical issues, and with the GTAA, honestly and candidly. In contrast, Arbitrator Shime found that the GTAA had acted in bad faith. He determined the GTAA simply associated the grievor with the other employee they had been monitoring and failed to assess her conduct independently. He further found that the GTAA's conduct as a whole was so egregious that it amounted to bad faith.

Arbitrator Shime found that reinstatement would not be appropriate given the high-handed conduct of the GTAA. He awarded damages in lieu of reinstatement (for past and future lost income), ordered the GTAA to delete all references to the discipline from its records and to provide the grievor with a letter of reference. He also awarded $50,000 for a combination of pain and suffering related to the grievor's knee injury and for mental distress related to the anxiety, depression and post-traumatic stress experienced by the grievor. He awarded a further $50,000 for punitive damages on account of the GTAA's "highhanded" conduct.

The Divisional Court's Decision

Arbitrator Shime's decision was largely upheld by the Divisional Court which determined there to be no error with respect to the monies he awarded for economic loss. It was completely appropriate they said, in the circumstances, for damages in lieu of reinstatement to be given. Further, they agreed it was appropriate to rely on classic contract principles in calculating the damages under this heading – namely that damages for breach of contract should place the person seeking them in the same position as if the contract had been performed, and that damages should be awarded that fairly and reasonably arise from the breach or as may reasonably have been in the contemplation of the parties at the time the contract was made.

Although it disagreed with a large part of his reasoning on the issue, it also found that Arbitrator Shime's award for mental distress damages could largely be justified. In particular, the Divisional Court stated that given the manner of the dismissal, and the particular characteristics of this grievor, mental distress damages were foreseeable by the parties.

There were, however, two main points of Arbitrator Shime's decision with which the Divisional Court disagreed. First, the Divisional Court found that Arbitrator Shime failed to provide the appropriate justification for including an award for pain and suffering related to the grievor's knee injury, which formed part of the mental distress damages. Secondly, the Court found that he failed to set out the appropriate justification for his award of punitive damages.

An award of punitive damages requires that there be a separate actionable wrong, apart from the wrongful dismissal. For example, a breach of a distinct contractual provision or duty may suffice as an independent actionable wrong. So too may a tort. What the Divisional Court found problematic here was that Arbitrator Shime failed to specify what separate actionable wrong

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"Effective January 1, 2012, employers will be required to deduct Canada Pension Plan contributions from the earnings of employees who are between 60 and 70 years of age even when the employee is already receiving Canada Pension Plan Pension benefits."

Elizabeth Forster represents employers, trade unions and employees. She has been involved in hearings before the Ontario Labour Relations Board, grievance arbitrations, collective agreement negotiations, Human Rights cases, and prosecutions under Occupational Health and Safety Act.

Elizabeth's work also includes wrongful dismissal actions, actions for breach of fiduciary duties and other employment and employee issues as well as labour-related actions. She advises clients on employment contracts, employment policies, non-competition and confidentiality agreements and employee pension and benefit-related issues.

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he was relying upon to support his award for punitive damages. Further, although he claimed that punitive damages were required in this case to denounce the conduct of the GTAA and to act as a deterrent, the Divisional Court found that Arbitrator Shime failed to explain why the other damages that had been awarded, which were significant, were not sufficient in this regard. He also failed to explain his rationale in selecting $50,000 as the appropriate amount for these damages.

At the end of its reasons the Divisional Court determined it was appropriate to set aside the mental distress and punitive damage awards and remit them back to Arbitrator Shime for reconsideration. The remainder of the award was upheld.

Impact of the Decisions

A new decision from Arbitrator Shime has not yet been released, and so, the story of the *GTAA v P.S.A.C., Local 004* continues. In the meantime, his original finding, and the subsequent decision of the Divisional Court, underscore the importance for employers to act in an even-handed manner and in good faith when disciplining an employee, particularly a long-standing employee with an unblemished record. Employers must take particular care when engaged in surveillance, dealing with employees on medical leave, and when dealing with individuals who are known to them as being particularly sensitive and vulnerable. To do otherwise will leave employers exposed to a range of damages far beyond what we might have been expected prior to Arbitrator Shime's decision. ■

CHANGES TO CPP DEDUCTIONS

Elizabeth Forster

The Canada Revenue Agency has announced changes to the rules for deducting Canada Pension Plan contributions. Effective January 1, 2012, employers will be required to deduct Canada Pension Plan contributions from the earnings of employees who are between 60 and 70 years of age even when the employee is already receiving Canada Pension Plan Pension benefits.

Different rules apply depending upon the age of the employee.

All employees who are receiving a CPP retirement pension will have to pay CPP contributions if they are under 65 years old.

If the employee is between 65 years of age but under 70 years of age, the employer will still have to deduct CPP contributions from the employee's earnings unless the employee files an election with the employer to stop paying CPP contributions. The election is contained in a form CPT30 which can be obtained on the Canada Revenue Agency's website.

The Canada Revenue Agency also notes in its website that any employer who fails to deduct CPP contributions in this manner may be assessed a penalty and interest charges. ■

ONTARIANS BACK TO THE POLLS OCTOBER 6, 2011

Melanie Francis

It is hard to believe but September is now upon us. Not only does this mean it is back to school for Ontario students, but that Ontario voters will go back to polls shortly. Throughout the month of September candidates across Ontario will be busily campaigning in advance of the October 6, 2011 general provincial election. Individuals, who are 18 years of age or older, are Canadian citizens and reside in an electoral district in the province, will be entitled to cast their ballot. Below is some key information for employers to keep in mind in advance of election day.

Employees entitled to three hours to vote

On election day, the polls (in most of the Province) will be open from 9:00 a.m. until 9:00 p.m. Employees are entitled to three consecutive hours while the polls are open for the purpose of voting. If an employee's hours of employment do not allow for these three consecutive hours, an employee may request this time off for voting. An employer is required to grant such a request, without any reduction in the employee's pay.

Employers entitled to select the most convenient time

Despite employee's entitlement to time-off (if necessary) an employee may not depart work at any time to go cast his or her vote. The *Election Act* specifies that time off for voting is to be granted at the time of day most convenient for the employer.

Employees entitled to leave for election duties

The *Election Act* also specifies that an individual participating in the election as an election official is entitled to time off to perform the role. An employee requesting leave under these provisions must make a request for the leave at least seven days prior to when the leave is to commence. An employer is not required to pay the employee during this period of leave, however, the leave cannot be subtracted from any vacation entitlement. ■

Blaney McMurtry welcomes our newest Associate

Catherine Longo

Catherine Longo, BSocSc (Hons.), J.D., has joined the firm's Labour and Employment and Insurance Defence Groups.

Catherine graduated from Queen's University and was called to the Bar in 2011. While attending Queen's she served two years on the Law Students' Society as Vice President of Activities. Outside of student government, her most rewarding experience was working with the law school's Correctional Law Program where she provided representation to federal inmates at internal disciplinary hearings. An avid traveller and student of international studies and development, Catherine also had the opportunity to pursue a human rights focused internship in Ghana.

Catherine earned her Honours degree in International Studies and Modern Languages from the University of Ottawa. During her time in Ottawa she was able to pursue a month-long course in international development in Senegal. She was also a dedicated volunteer with the school's multicultural group, International House.

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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 Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

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