Emond Harnden LLP

# Year End Wrap Up

## A Review of Legislative and Employment Law Developments in 2005

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# Overview

- Legislative review
- The disabled employee – Keays v. Honda
- Extension of progressive discipline to the non-unionized workplace
- Update on just cause in employment law
- Update on *Wallace* damages
- Other recent developments

# *Legislative Review*

# Mandatory Retirement - Current

- No legislation of general application in Ontario that currently requires employees to retire at the age of 65

- Employers have imposed as a term of the employment or developed policies requiring employees to retire at the age of 65

# Mandatory Retirement - Current

- S.5(1) of the Ontario *Human Rights Code* provides:
    - Every person has a right to equal treatment with respect to employment without discrimination because of… age…
- "Age" means an age that is eighteen years or more, except in subsection 5(1) where "age" means an age that is eighteen years or more *and less than sixty-five years*.

# Bill 211 Amendments

- Proposed legislation would amend the definition of “age” in the *Human Rights Code:*
  - “Age” means an age that is 18 years or more

# Implications:

- *Prima facie* discriminatory to adopt a policy which makes retirement at the age of 65 mandatory.

- Employers may impose mandatory retirement where the employer can establish that age is a *bona fide* occupational qualification:

  I. the standard was adopted for a purpose rationally connected to the performance of the job;
  II. the standard was adopted in an honest and good faith belief that was necessary to attain this legitimate work-related purpose; and
  III. the standard is reasonably necessary to accomplish the purpose. It must be shown that it is impossible to accommodate the needs of the employee without imposing undue hardship on the employer.

# Impact on Other Legislative Schemes

- *Workplace Safety and Insurance Act, 1997*

  **Part 1 of the Workplace Safety and Insurance Act, 1997 is amended by adding the following section:**

  ***Human Rights Code***

  ***2.1*** *(1) A provision of this Act or the regulations under it, or a decision or policy made under this Act or the regulations under it, that requires or authorizes a distinction because of age applies despite sections 1 and 5 of the Human Rights Code.*

  ***Same***

  *(2) Subsection (1) applies with necessary modifications to any predecessor to this Act or the regulations under it, or any decision or policy made under such an Act or regulation.*

  ***Same***

  *(3) Subsections (1) and (2) apply even if the facts in respect of which the requirement or distinction is made occurred before the day on which this section comes into force.*
- *Employment Standards Act, 2000*
- *Pension Benefits Act*

# Potential Issues with the Elimination of Mandatory Retirement

- Performance Management
- Accommodation
- Health-Related Costs
- Pension Costs

# Potential Issues with the Elimination of Mandatory Retirement

- Termination in Non-Unionized Setting
  - Unless cause for dismissal, employer required to provide reasonable notice in accordance with *ESA* and common law
  - Employee may allege that decision to terminate was based on age and contrary to *OHRC*
- Terminating in a Unionized Workplace
  - Cannot contract out of provisions of the *Code*
  - Just cause for discipline or discharge
  - Layoff – reverse order of seniority

# Mandatory Retirement

- Bill 211 will come into force one (1) year after it receives Royal Assent

# *Labour Relations Act, 1995*

- Bill 144 received Royal Assent on June 3, 2005
- Bill 144 restores:
  - OLRB's power to order automatic certification as a remedy for an employer's unfair labour practice during an organizing drive
  - OLRB's power to issue interim orders
  - Card-based certification in the Construction Industry

# *Labour Relations Act, 1995*

- Bill 144 also:
  - Ends mandatory posting of decertification information
  - Eliminates union salary disclosure
  - Makes permanent a dispute resolution regime in the residential sector of the construction industry in Toronto and surrounding area
  - Requires Minister to appoint interest arbitrators in the ambulance sector

# Other Statutory Developments

- *Accessibility for Ontarians with Disabilities Act*
- *Good Government Act, 2005*

# *The Disabled Employee*
# *Keays v. Honda*

# *Keays v. Honda* – (2005; Ont. C.A.)

**Facts**

- Keays was an employee at Honda Assembly Plant for 14 years
- "grim history of absences"
- 2 year leave with short-term & long-term disability benefits
- Returned to work when benefits ceased
  - Coaching as part of progressive discipline process
  - Special program for accommodation
- Asked employee to meet with occupational medicine specialist
- Keays refused and was terminated for insubordination

# The Decision

**Cause for termination**

- Honda unsuccessful in establishing cause for termination
- Keays justified in refusing to meet with Honda's physician
- Termination "totally disproportional" to alleged insubordination
  - Keays dedicated employee for 14 years
  - No 'morally' blameworthy behaviour, insolence or disrespect
  - Conduct motivated by legitimate concern
  - Available alternative means of discipline
  - No evidence that refusal to see physician disrupted production

# The Damage Award: $500,000

- Keays awarded **24 mos** notice period
  - 15 mos pay in lieu of notice based on 'Bardal Factors'
  - Additional 9 mos salary (Wallace Damages)
- Keays also awarded **$500,000** punitive damages based on independent actionable wrong of harassment/discrimination
- No damages for breach of *Human Rights Code*
  - *"…with significant reluctance, I am forced to find that this court is without jurisdiction to consider this basis of relief. However, these complaints could constitute "independent actionable wrongs" such as to trigger an award of punitive damages, assuming they also merit punishment…"*
- Notice of Appeal filed April 18, 2005

# Lessons Learned from *Keays v. Honda*

- Potential risks of involvement of employer's physicians
- What constitutes harassment of a disabled employee
- When requesting medical certificates is inappropriate
- Necessity of individualized approach
- Role of medical certificates
- Impact of finding of harassment/discrimination

# Support for the 'One-Off' Position

| Year | Case | At Trial | | | | On Appeal |
|---|---|---|---|---|---|---|
| | | Notice | Aggravated | Punitive | Tort | |
| 2005 | *Keays* v. *Honda* | 15 mos | 9 mos Wallace | $500,000 | —— | ———— |
| 2003 | *Zorn-Smith* v. *BMO* | 16 mos | | Claim Failed | $15,000 | ———— |
| 2002 | *Prinzo v. Baycrest Centre* | 18 mos | —— | $5,000 | $15,000 | Punitive Overturned 18 mos → 12 mos |
| 2001 | *Marshall v. Watson Wyatt* | 9 mos | 3 mos Wallace | $75,000 | —— | Punitive Overturned |
| 2000 | *Antonnacci* v. *Great Atlantic & Pacific* | 24 mos | $15,000 | Claim Failed | —— | Aggravated Overturned |

# Managing an Employee with a Disability

- Document efforts to accommodate employees
- Work with medical evidence
- Ensure medical information not over-stated or misrepresented
- Consult with lawyer

# *Extension of Progressive Discipline to the Non-Unionized Workplace*

# Purposes In Imposing Discipline

- Rehabilitation
- Deterrence
- Punishment

# Documentation

- Record in full detail all information relating to the incident
- Names, dates, time of occurrence, witnesses
- 5 w's (who, what, where, when and why)

**Remember to:**

- Include all related information/all relevant facts
- Do not hesitate to provide more information than may be necessary
- Use direct quotes
- Have all supervisors who witness an incident complete the form

# Proving Just Cause For Discipline

## (The Seven Tests Of Just Cause)

- Was the rule or work order that the employee violated a reasonable one?
- Was he/she given adequate notice that his/her conduct was improper?
- Was a sufficient investigation made?
- Was the investigation fair?
- Was the misconduct proved?
- Did the employee receive equal treatment compared with other employees?
- Was the penalty appropriate?

# Progressive Discipline in Non-unionized setting

- Vast majority of cases in this area have determined that a disciplinary suspension may amount to a constructive dismissal
- If an express term in the employment contract permits suspension for misconduct, the courts have held that such will not amount to a constructive dismissal

# Progressive Discipline in Non-unionized setting

- Where employer has cause to dismiss, suspension may be permissible
- If suspension made with pay, more likely that a court will not find that constructive dismissal has occurred

# *Carscallen v. FRI Corp.* (2005; Ont. SCJ)

**Facts**

- Marketing executive claimed she had been constructively dismissed
- Company's booth and promotional materials failed to arrive on time at a trade show in Barcelona, Spain
- Exchange of combative e-mails between Carscallen and the CEO regarding the incident
- Carscallen was then informed that she was being suspended indefinitely
- In addition to the suspension without pay, she was demoted, denied flexible working hours and moved from an office to a cubicle

# *Carscallen v. FRI Corp.* (2005; Ont. SCJ)

- FRI Corporate Employment Policies and Procedures Manuals make no mention of an employer right to suspend
  - Speaks to implementing "fair and constructive disciplinary guidelines, which we feel will allow for rehabilitation in the workplace rather than punishment"
- The employer did not follow its policy
  - Appeared to have been an "ad hoc/knee jerk" reaction approach to employee discipline
- The addition of sanctions relating to her office, title and work hours in addition to unpaid suspension were punitive, mean spirited and designed to humiliate Carscallen.

# *Carscallen v. FRI Corp.* (2005; Ont. SCJ)

**Decision**

- Evidence did not support finding of just cause
- While Carscallen less than diligent in her efforts to ensure that the booth and materials made it to Barcelona, those transgressions, by themselves, did not represent the "flagrant dereliction of duty" required for a finding of just cause

# *Carscallen v. FRI Corp.* (2005; Ont. SCJ)

- Having found that just cause did not exist the court determined that FRI should not have indefinitely suspended Carscallen without pay and accompanied that with a title demotion, office downsizing, and removal of flex hours
- Finding of constructive dismissal

# *Update on Just Cause in Employment Law*

# Just Cause

- Fundamental breach of the employment contract
- Onus on employer to justify dismissing an employee for just case
- Employer not obligated to give notice of termination
- Financial implications if judge eventually holds there was no cause for the termination

# *Daley v. Depco International Inc.*, (2004; Ont. S.C.J.)

**Facts**

- Alleged that employee involved in 9 incidents over a period of 2 ½ years
- In determining just cause court relied on last 5 incidents
- Terms of employee handbook followed when imposing progressive discipline
- Employer documented all responses to each incident
- Court found just cause existed –
  - *While each of these five incidents might not be sufficient to amount to just cause by themselves, when viewed collectively, the conclusion that must be drawn in this instance is that the series of acts cumulatively do amount to enough "bricks to constitute a just cause wall"…*
- Employee's action dismissed

# *Tong v. Home Depot of Canada* (2004; Ont. S.C.J.)

**Facts**

- 54 year old sales associate
- 4 ½ years service with the employer
- Newly hired floor manager formed opinion his first day that Tong was taking longer breaks than permitted
- Manager kept Tong under surveillance and provided supervisor with report that Tong was committing "time fraud"
- Tong was immediately fired

# *Tong v. Home Depot of Canada* (2004; Ont. S.C.J.)

**Decision**

- Investigation was fatally flawed
- Original notes were destroyed
- And only a summary of events was prepared prior to meeting with supervisor
- *"The evidence led at trial is too weak to sustain a finding of just cause"*

# *Update on "Wallace" Damages*

# Update on "*Wallace*" damages

- The employer may be liable for additional damages if the manner of termination was in "bad faith", and they do not fulfill the duty of "good faith" and "fair dealing."
- When terminating an employee, employers should therefore avoid being:
  - Untruthful
  - Misleading
  - Unduly insensitive

# *Yanez v. Canac Kitchens* (2004; Ont. S.C.J.)

**Facts**

- Downturn in employer's business
- Forman terminated after more than 15 years of service
- Company offered severance packages
- Claim for "*Wallace*" damages based on:
  - The employer originally offering Yanez 13 weeks severance, based on the mistaken belief that he had 10 years of service
- When error discovered, employer offered him the statutory minimum plus 4 days
- Claim for "*Wallace*" damages was rejected

# *Yanez v. Canac Kitchens* (2004; Ont. S.C.J.)

## Decision

- *Canac was not trying to play the kind of "hardball" that the Supreme Court of Canada warned against in the Wallace case. When this employer discovered its mistake and rectified it, it made the payment to the employee in a timely fashion. I find that Canac's conduct was neither malevolent or egregious but simply sloppy….*

# *Yanez v. Canac Kitchens* (2004; Ont. S.C.J.)

- Court expressed its irritation at having to adjudicate a claim that clearly had no merit

  *"The time has now come to express this Court's disapproval of routine assertions of "Wallace damage" claims which are not justified by the facts.*

  *…*

  *[T]hought must be given in future cases to appropriate deterrents against plaintiffs who assert "Wallace claims" which are clearly without merit and should not have been advanced. Sanctions could include a diminution of either the costs award or the amount awarded for such dismissal claims. Unmeritorious "Wallace claims" for bad faith firings ought not to be an apparently automatic inclusion in every plaintiff's prayer for relief."*

# *Bryson v. Print Key Inc* (2005; Ont. S.C.J.)

**Facts**

- Bryson was employed at Print Key for almost 14 years
- In February 2004, she was advised that she was being placed on temporary lay-off
- She was given notice of termination in May 2004
- Claim for *Wallace* damages based on
  - the assertion that the employer had no intention of recalling her; and
  - the employer's 2 month delay in providing a reference letter

# *Bryson v. Print Key Inc* (2005; Ont. S.C.J.)

- The Court found:

  *In the instant case, there is insufficient evidence to conclude that the defendant was making use of the temporary lay-off provision of the ESA for an improper purpose or that it was acting in any way so as to be insensitive to the plaintiff. There is no evidentiary basis for concluding that the defendant used the ESA temporary lay-off provisions to avoid responsibility for financial obligations to the plaintiff*

  *…*

  *When the Employer complies with the ESA in this fashion, it cannot be considered bad faith conduct so as to attract Wallace damages. The conduct in question does not reach the level of being deliberately misleading or insensitive to justify a Wallace bump up.*

# *Bryson v. Print Key Inc* (2005; Ont. S.C.J.)

- A letter of reference was not sought until counsel for the plaintiff wrote the defendant in June 2004.
- A draft of a letter was then sent to the plaintiff
- The Court found that there was no serious delay in providing the letter of reference to justify an extension of the notice period
- Claim for Wallace damages dismissed

# *Other Recent Developments*

# Ontario Health Premium ("OHP")

- Before 1990 Ontarians paid health care premiums
- Many collective agreements negotiated prior to 1990 contained provisions requiring the employer to pay the cost of those premiums
- 1990 - Premium replaced by Employer Health "Tax"
- Introduced by Ontario government in 2004 provincial budget
- Issue: where collective agreements retained the old language relating to health care premiums, who bears burden of buying new OHP?

# Ontario Health Premium ("OHP")

- Majority of arbitration awards have found OHP to be a "tax" not a "premium"
  - OHP is an individual "total" income tax imposed on employees pursuant to the Ontario *Income Tax Act*
  - No statutory link between OHIP and OHP
  - Non-payment of the OHP does not have an impact on employee's healthcare benefits under OHIP

# *UPDATE: Lapointe-Fisher Nursing Home* (2005; Ont. S.C.J.)

- Collective agreement provided:

  24.01

  a) The Employer agrees to pay 100% of the OHIP premiums for all full-time employees who are regularly scheduled to work seventy-five (75) hours in a bi-weekly pay period on a permanent base.

  b) The Employer agrees to pay 50% of the OHIP premiums for all employees who work in excess of forty-eight (48) hours but less than seventy-five (75) hours in a bi-weekly pay period on a permanent base. The employee shall pay 50% of the OHIP premiums through payroll deductions.

  (c) To be eligible for (a) or (b) above, the employee must be the principal breadwinner in their family.

# *Lapointe-Fisher Nursing Home* (2005; Ont. S.C.J.)

- At arbitration:
- Arbitrator concluded that the collective agreement language was wide enough and comprehensive enough to include the new premium/tax
- On judicial review, the court applied a standard of "patently unreasonable"

# Ontario Health Premium ("OHP")

- Lessons for Employers:
  - Examine collective agreement language – liability depends on the language
  - Note that Unions may attempt to negotiate payment of the OHP in the next round of bargaining
- Approximately 9 decisions referred to judicial review

# *Questions*