

**RECENT DEVELOPMENTS IN EMPLOYMENT LAW AND HOW THEY IMPACT HR  
PROFESSIONALS**

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## **RECENT DEVELOPMENTS IN EMPLOYMENT LAW AND HOW THEY IMPACT HR PROFESSIONALS**

By Karen Sargeant and Ida Martin

Employment law is always evolving. The past year has been no different. Many recent changes will impact how human resource professionals approach problems. The following outlines some of the major developments.

### **Honda v. Keays –Punitive and Bad Faith Damages**

In June of 2008 the Supreme Court of Canada (SCC) released its decision in *Honda Canada Inc. v. Keays*. This decision puts a halt to the previous practice of awarding punitive damages in wrongful dismissal actions.

#### Facts

A long time Honda employee, Kevin Keays, was diagnosed with chronic fatigue syndrome. After a period on long-term disability benefits, Keays returned to work. Although Honda exempted Keays from its normal attendance-related progressive discipline policy, Honda required Keays to provide a medical note every time he was absent (which was not required for most employees).

Keays was sporadically absent from work. In response, Honda hired Dr. B to assess Keays. Keays hired a lawyer. The lawyer wanted to understand the purpose of the meeting between Dr. B and Keays. Honda refused to deal with the lawyer and made Keays subject to the normal attendance-related progressive discipline policy. Keays continued to refuse to meet with Dr. B unless Honda would clarify the purpose of the meeting. Honda terminated Keays' employment for insubordination.

#### At Trial

The trial judge found there was no just cause for dismissal and that Honda had acted in bad faith in the manner of the dismissal. For this, the trial judge awarded Keays 15 months' pay in lieu of reasonable notice as well as a 9 month extension to the notice period for the bad faith actions of Honda. On top of this 24 months of pay, the judge awarded \$500,000 in punitive damages because he found that Honda had harassed and discriminated against Keays in the course of his employment.

#### On Appeal

The Ontario Court of Appeal upheld most of the trial judge's awards, however, it reduced the punitive damages award from \$500,000 to \$100,000.

## Supreme Court of Canada

The SCC upheld the award of 15 months' damages in lieu of reasonable notice, but overturned the rest of the award. That is to say, there was no 9 month "bad faith" extension and no punitive damages. This decision changes the law in relation to wrongful dismissal in a few ways:

- **No more *Wallace* extension.** An extension of the notice period will no longer be awarded in cases of bad faith conduct on the part of employers. Instead, the employee will have to show that he or she has suffered actual damages from the conduct. Employees used to routinely claim Wallace damages in circumstances where no actual damage had been suffered. This will likely stop in light of this decision.
- **Fewer cases warranting punitive damages.** Punitive damages are only to be awarded in "exceptional cases," where the employer's "advertent wrongful acts . . . are so malicious and outrageous that they are deserving of punishment on their own."
- **No more "double-compensation."** It will be rare to have both bad faith damages and punitive damages. The Supreme Court of Canada told the courts that they must "avoid the pitfall of double-compensation or double-punishment" by providing both bad faith damages and punitive damages where these damages are not proven or justified. Unless there is egregious or outrageous behaviour, there should not be punitive damages awarded.
- **Use the Human Right's tribunal for actions based on discrimination.** The *Ontario Human Rights Code* "provides a comprehensive scheme for the treatment of claims of discrimination." Claims based on discrimination should be brought through this scheme rather than through the civil courts. The SCC reaffirmed the principle that a civil action cannot be based solely on a breach of the *Ontario Human Rights Code*.
- **Employers may manage absenteeism.** The SCC recognized that employers "need to monitor the absences of employees who are regularly absent from work." The SCC saw this ability to manage absenteeism as "a bona fide work requirement in light of the very nature of the employment contract." This should strengthen the employer's ability to pursue information regarding absenteeism from its employees and to manage absenteeism in the workplace.

## **Employment Standards Act Updates**

There are a few recent changes to the *Employment Standards Act* as well as some proposed changes that HR professionals should be aware of.

### Public Holidays for Elect to work Employees

Effective January 2, 2009, the Public Holidays for Casual Employees Regulation (Regulation 285/01 under the *Employment standards Act*, 2000) was amended to remove "elect to work" employees from the exemptions relating to public holidays.

This mean that elect to work (or casual) employees now have the same rights to public holidays as other employees.

### Temporary Help Agencies

Bill 139 - Temporary Help Agencies received royal assent on May 6, 2009 and comes into force on November 6, 2009. The purpose of the bill is to increase the ability of temporary workers to get permanent employment. This Bill also aims to protect temporary workers from abuse.

Temporary help agencies will no longer be allowed to restrict employees and clients from:

- entering into employment relationships;
- charging their employees a fee for accepting employment with a client;
- charging a finder's fee to clients; or
- restricting a client from providing a reference.

Agencies will not be allowed to charge fees for:

- becoming an employee of the agency;
- being assigned, or having the potential to be assigned, to a client of the agency; or
- the preparation of resumes or assistance in preparing for job interviews.

Also, temporary help agency employees will be entitled to notice of termination and severance pay. A temporary employee's employment will be considered terminated where he or she has not been assigned to perform client work for a period of 35 weeks. Termination pay will be calculated based on average earnings over the 12 week period preceding the actual or deemed termination date.

Bill 139 doesn't cover all temporary workers. It doesn't cover a temporary worker who is providing professional services, personal support services or some home making services.

### **Wronko v. Western Inventory Services**

#### Facts

In September 2002, Western Inventory's new president sent a revised employment contract to one of its employees, Darrell Wronko. This employment contract purported to reduce Wronko's severance package to 30 weeks' pay when it had previously been 2 years. Wronko refused to sign this contract. Western Inventory thought that since the notice period to which Wronko was entitled was 2 years, that Western Inventory could therefore unilaterally change the employment contract with 2 years notice. In September 2004 (2 years after the initial letter reducing the

severance package to 30 weeks pay) Western Inventory wrote to Wronko to advise him that the 30 week termination was now in effect. Wronko replied that this amounted to constructive dismissal and sued Western Inventory for the 2 years severance package in his original employment contract with Western Inventory.

### At Trial

The trial judge found that Western Inventory could change the employment contract unilaterally upon reasonable notice to Wronko. He therefore concluded that Wronko hadn't been constructively dismissed but rather had resigned. Wronko therefore did not get the 2 year severance package.

### On Appeal

The Ontario Court of Appeal overturned the trial judge's decision. The court concluded that Western Inventory didn't have the right to unilaterally change the employment contract. The appeal court identified three options that are available to an employee if an employer attempts to unilaterally change the employment contract:

1. the employee may accept the change;
2. the employee may reject the change and sue for damages if the employer persists in treating their relationship as subject to the varied term (this is what is called "constructive dismissal"); or
3. the employee may make it clear that he or she is rejecting the new term.

If the employee chooses option three, the court gives the employer two choices:

1. it can advise the employee that refusal to accept the new term will result in his or her termination, and that employment would be offered on new terms at a stated point in time. However, this will trigger any termination rights the employer may have. The employer would have to deal with that by providing notice of the change which is equal to the notice of termination to which the employee is entitled; or
2. the employer can accept that there would be no agreement and continue employment on existing terms.

If the employer doesn't expressly terminate the existing employment contract, the existing employment contract would remain in effect.

### Take Home Message for Employers

This decision clarifies that the employer must actually provide reasonable notice of termination of the existing contract, not just notice of a change to the contract, to the employee. An employer may, however, offer another contract of employment on different terms to the employee at the same time that he is offering notice of termination of the old employment contract

As an employer, it is important not to assume that the changes proposed are accepted. The employer should obtain the employee's explicit agreement to the changes - otherwise the

employer risks being found to have acquiesced to the status quo. Also, if the employer terminates an existing employment agreement hoping that the employee will agree to a new agreement on different terms, the employer has to be ready to face the consequences of the employee refusing the different terms, and of the existing agreement being terminated.

### **Overtime Hours Class Actions**

One of the big issues in Canadian employment law in the past two years has been overtime class-action claims. There have been a number of overtime class-action lawsuits since 2007.

- a \$651 million class-action lawsuit filed against the Canadian Imperial Bank of Commerce (CIBC);
- followed quickly by a \$20 million class action against KPMG;
- a \$350 million class action against a second major Canadian Bank, Scotiabank.
- further class actions in 2008 – against CN Railway in March 2008 for \$250 million; and
- a \$360 million class action against CIBC by investment bankers and analysts in October of 2008.

Since that time, one class action has been settled and one has not been certified as a class action by the Ontario courts.

#### Overtime class action against KPMG settled

In September 2008, the Ontario Superior Court approved a settlement of the KPMG case, making it the first of the class-action lawsuits to be settled. To resolve the class action, KPMG agreed to an overtime redress plan.

Under the terms of the overtime redress plan, current and former employees employed between January 1, 2000, and September 30, 2007, who are eligible for overtime pay under the applicable employment standards law will be compensated for such overtime, plus interest.

Current employees offered overtime pay under the overtime redress plan can take overtime pay, time off instead of overtime pay, or a combination of the two. Individuals also may receive up to \$500 for the cost of independent legal advice about their own overtime claim.

#### *How are these claims to be administered?*

The following administrative processes were approved by the court:

- current and former employees were sent a determination letter setting out their eligibility to overtime pay. Approximately 11,333 determination letters were sent;

- employees must accept or reject the proposal set out in the determination letter (Individuals who accept the proposal must sign a full and final release in KPMG's favour);
- if an employee fails to accept or reject the proposal, he or she is deemed to have rejected the proposal;
- if an employee rejects the proposal, the individual can submit documentation for further consideration and investigation by a third party;
- once the matter has been investigated, a reconsidered determination letter is sent to the individual and KPMG. The employee and KPMG have 25 days to respond to the reconsidered determination letter;
- if the employee and KPMG accept the proposal in the reconsidered determination letter, the matter is resolved and the employee signs the full and final release in KPMG's favour;
- if either the employee or KPMG rejects the proposal in the reconsidered determination letter, the claim proceeds to mediation (at KPMG's expense); and
- if the claim is not resolved at mediation, it proceeds to binding arbitration (also at KPMG's expense).

*What about the law firms representing the current and former employees?*

The employees' lawyers don't go away empty handed either. The court will calculate and fix their fees and disbursements, which may be as high as \$600,000. Of course, KPMG will be responsible for paying them.

Before approving the overtime redress plan, the court certified the claim against KPMG as a class action. In doing so, the court concluded that, for settlement purposes, the criteria for certification were satisfied: the claims of the class raised common issues and the class action was preferable to 11,000 individual claims

#### CIBC Action Not to Proceed as a Class Action

On June 18, 2009, the Ontario Superior Court refused to certify the first CIBC action. In that action, the representative employee was seeking compensation for unpaid overtime on behalf of a class of current and former frontline bank employees which could have had more than 31,000 class members. The employees claimed that:

- CIBC's overtime policy was unlawful;
- CIBC required employees to do more work than could reasonably be completed within standard working hours;

- employees regularly worked overtime; and
- employees were discouraged from submitting overtime.

The court determined that a class proceeding was not the proper way to resolve the claims against CIBC. The court decided this because the claims against CIBC were individual in nature. Unless there was systemic abuse or some element of commonality, there was no justification for a class-action proceeding.

CIBC had an overtime policy which the court found was reasonable. This policy required employees to obtain prior approval from their manager for overtime. The court found that this was lawful.

Although CIBC is a federally regulated employer, the court's reasons will likely apply to the other proceedings across the country that involve provincially regulated employers.

This decision might prevent other people from considering starting an overtime class action; it does not however completely determine the issue of whether a class-action claim could ever be sustained for unpaid overtime. For example, the court has yet to determine whether a class action is the preferable procedure in a case where the issue is whether there is a whole group of employees who should have been paid overtime, but were exempted from it for one reason or another.

One claim like this is the claim against CN Railway. The employees bringing the suit are alleging that the Railway misclassified operational supervisors as management in order to avoid paying them the overtime required under the *Canada Labour Code*.

This decision does not mean that employers can neglect to pay overtime. Employers still need to take care to actively manage overtime issues so that they can avoid and defend against overtime claims.

### **Changes to Occupational Health and Safety – Workplace Violence**

Ontario is looking to reduce violence and harassment in the workplace. To that end, Bill 168 is an Act to amend the *Occupational Health and Safety Act* with respect to violence and harassment in the workplace, received first reading on April 20, 2009.

The key components of Bill 168 are:

- workplace violence and harassment policies;
- workplace violence and harassment programs;
- workplace violence assessments;
- disclosure of information where there is a risk of violence; and
- work refusals upon threat of workplace violence.

### Policies

Bill 168 would require employers to prepare a policy with respect to workplace violence and a policy with respect to workplace harassment. “Workplace violence” is defined as the exercise of (or an attempt to exercise) physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker.

“Workplace harassment” is defined as 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.

Employers would have to review the policies at least annually and those with more than five employees would be required to post the policies in the workplace.

### Programs

Bill 168 would also require employers to develop and maintain a program to implement the workplace violence and workplace harassment policies.

The workplace violence program would have to include measures and procedures:

- to control the risks identified in the assessment (described below) as likely to expose a worker to physical injury;
- for summoning immediate assistance when workplace violence occurs or is likely or threatened to occur;
- for workers to report incidents or threats of workplace violence; and
- for investigating and dealing with incidents, complaints, or threats of workplace violence.

The workplace harassment program would have to include reporting and investigation procedures.

### Workplace violence assessments

Employers would have to prepare a workplace violence assessment to assess the risk of violence in the workplace. The assessment would be based on the nature of the workplace, the type of work, and the conditions of work. Employers would then have to advise the workers of the results of the assessment.

### Particular risk of violence

Bill 168 would require employers and supervisors to inform workers of a risk of workplace violence from a person with a history of violent behavior if:

- the worker was expected to encounter that person in the course of his or her work; and

- the risk of workplace violence was likely to expose the worker to physical injury.

Further, if there was a risk of domestic violence in the workplace, the employer would be required to take every precaution reasonable in the circumstances for the protection of workers.

### Work refusals

Bill 168 would also amend Part V of OHSAA so that workers would have the right to refuse or stop work where they felt endangered by workplace violence.

As is the case with respect to work refusals generally, the worker's refusal to work would be investigated by the employer and, potentially, a Ministry of Labour inspector.

### Implications for employers

The OHSAA already states that employers must take every reasonable precaution to protect its employees. Bill 168 simply makes it clear that employers have to take precautions to protect their workers specifically from violence and harassment. If bill 168 becomes law, employers will need to develop policies and programs to deal with workplace violence. This will be particularly important in those workplaces which face a greater risk of violence such as health care, social services, hospitality, retail, education, police, and corrections industries.

## **Changes to Ontario's Human Rights Regime**

On June 30, 2008, new human rights legislation in Ontario came into force. The new regime radically changes the way in which human rights complaints are dealt with in Ontario. Employers, employees, and unions are watching closely to see how well the new system works.

### 1. Complainants given direct access to tribunal

Prior to June 30, 2008, complaints in Ontario were made to the Human Rights Commission. From there, the Commission mediated and investigated complaints. At the end of that process, which took four to five years in many cases, the Commission could dismiss a complaint or send it to the Human Rights Tribunal of Ontario for a full hearing.

Now, complainants file their complaints directly with the Tribunal, cutting out the often lengthy Commission processes. Although the Tribunal will have some powers to mediate disputes, the plan is for vice chairs to adjudicate complaints much earlier in the process. However, the Tribunal is not permitted to dismiss a complaint without giving all parties the opportunity to make oral submissions. This may be a real barrier to an effective mediation process. It therefore remains to be seen whether the length of time it takes to resolve complaints will be shortened.

### 2. Commission's role changed drastically

As it will no longer be processing complaints, the role of the Commission will change radically. Indeed, we know that many of the Commission's staff have already been or will soon be terminated.

Those staff left at the Commission will focus their efforts on the prevention of discrimination, through public education, promotion and public advocacy, research, and analysis.

While the Commission will have the ability to bring a complaint to the Tribunal on its own behalf or to intervene in significant individual complaints, its involvement in complaints being heard by the Tribunal will be drastically reduced.

### 3. Limits on damages removed

Not only will complainants have more direct access to the Tribunal in the new regime, they will also have the potential ability to recover more money.

Prior to June, complainants were limited to \$10,000 for damages for mental anguish. That cap is no longer in place, meaning the Tribunal will have the power to award more money on account of mental anguish. Similarly, the Tribunal's power to award damages for compensation and restitution are unlimited.

Together, these expanded powers to give monetary awards likely means that damage awards in human rights cases will increase. So with more to gain by going to a Tribunal hearing, complainants may be less likely to settle complaints early.

### 4. Complainants given longer to launch complaints

If the potential for more hearings and larger damages awards isn't bad enough for employers, complainants also now have a longer time in which to file complaints. Bill 107 has changed the limitation period for filing complaints from six months to one year.

As mentioned earlier, the Tribunal may not dismiss a complaint without giving the parties the opportunity to make oral submissions. Respondents will now be forced to pay for at least some degree of litigation cost before a complaint, even a frivolous one, is dismissed.

### 5. Human Rights Legal Support Centre given funding

Under the old regime, once complaints were referred to the Tribunal, a lawyer from the Commission was appointed to "prosecute" the complaint. Although the Commission lawyers weren't technically the complainants' lawyers, practically that was the result.

Under the new regime, Commission lawyers will not be responsible for prosecuting complaints. Some saw this as an access to justice problem. In response, the government created and funded a Human Rights Legal Support Centre, which will provide a range of legal support services to complainants.

The Human Rights Legal Support Centre opened its doors on June 30, 2008. We understand that it employs a staff of between 40 and 50 lawyers and law clerks. It is unclear how much legal support these lawyers and law clerks will be able to provide to the 2,500 or more applicants that make human rights complaints each year. However, it is clear that many complaints against employers will still be publicly funded. And more of these than ever will end up in hearings.

## 6. Human rights issues in civil litigation

Until now, individuals were expected to restrict their human rights complaints to making a complaint at the Commission, rather than suing in court for breach of their human rights. There was little scope to add a human rights issue to another lawsuit. Now, however, someone starting a lawsuit in Ontario can claim, in addition to other claims, a breach of their human rights. For example, an employee fired from work can now bring a lawsuit claiming damages for being wrongfully dismissed and additional damages for an alleged breach by his employer of his human rights.

Why is this significant? Because now judges have the ability to award all of the human rights damages and remedies, including damages for mental anguish (which, as discussed earlier, has no cap) and reinstatement. Although the courts have historically stayed away from reinstating terminated employees, it is now a possibility. We will have to wait and see how judges deal with these increased powers. At a minimum, you can expect to see more human rights allegations in employment-related lawsuits.

### What employers should do

Given these changes, you may wish to take the opportunity to review and update existing human rights practices and policies and to implement preventive measures. Obviously, the best way to avoid the negative consequences of these changes to the human rights regime will be to keep any workplace issues from becoming human rights complaints. Employers may also want to ensure that you have a “quick response plan” in place with your legal advisers to deal with complaints when they are received.

## **Changes to Ontario’s Civil Litigation System**

As of January 1, 2010, changes to a number of areas of Ontario’s *Rules of Civil Procedure* will come into effect. These changes aim to streamline the litigation process and increase plaintiffs’ access to justice.

### Small Claims Court

The Small Claims Court is a branch of the Superior Court of Justice which deals with a wide range of matters. No lawyers are required in Small Claims Court. The role of Small Claims court is to provide a simplified process to give access to justice for people claiming smaller sums of money. Currently the monetary limit in Small claims court is \$10,000. After January 1, 2010, the limit will increase to \$25,000.

### Simplified Procedure

Simplified Procedure is another mechanism the court uses to streamline the trial process for claims for relatively low amounts of money.

As of January 1<sup>st</sup>, 2010, the monetary limit of simplified procedure will be raised from \$50,000 to \$100,000. In addition to raising the monetary limit of Simplified Procedure, parties

will now have an opportunity for a limited discovery to obtain more information about the opposing case before trial. The idea is to help to encourage earlier settlement discussions.

### Discovery

Parties will be now required, early in the litigation process, to agree on a discovery plan that sets out the scope of discovery, how documents will be produced and when pre-trial Examination for Discovery will take place. For regular non Simplified Procedure actions, each party will be limited to a total of seven hours of pre-trial Examination for Discovery unless the parties consent or the court orders otherwise.

### Summary Judgment

A plaintiff or defendant can bring a summary judgment motion forward if they want to argue that the case is so straight forward that there is no issue for trial. In the past, if the party who brought the summary judgment motion lost the motion, they were required to pay the other party their costs for responding to the motion. This had a chilling effect on bringing motions for summary judgments. This rule has now been changed to give the judge the discretion to decide if the motion was brought improperly and if so, to impose costs where appropriate. A judge will now be able to order oral evidence to be presented by one or more parties (a "mini-trial"). If there is a trial, the court will now be able to give directions on additional matters including timelines, examinations, and a discovery plan. This should help to speed up the process.

In *Adjemian v. Brook Crompton North America*, the Ontario Court of Appeal confirmed that wrongful dismissal cases can be resolved by summary judgment under the Superior Court's simplified procedures.

### *Facts*

The plaintiff, Dolores Adjemian, had worked more than 22 years for an electric motor manufacturer, Brook Crompton. She had an annual salary of around \$50,000. She was let go because of economic difficulties at the company but was given very favourable letters of reference, and four months' pay in lieu of notice. She felt she deserved at least 16 months' notice, and commenced legal action. Her claim seemed "open and shut," so she moved for summary judgment under simplified procedure.

### *At Trial*

The judge ruled that in this case the plaintiff not only met the relaxed summary judgment test under Simplified Procedure, she actually met the stricter test under regular Rule 20 – there was no genuine issue for trial here. The employer argued that there were three triable issues: 1. whether the plaintiff's efforts to mitigate her damages by finding another job were adequate; 2. the nature of her employment; and 3. the assessment of her damages.

On the mitigation issue, there was "overwhelming evidence" that the plaintiff had made and continued to make reasonable efforts to mitigate her loss. (As of the hearing date, she had applied for 120 positions in various industries and job types and had attended 9 job interviews.) Regarding the nature of the plaintiff's employment, the trial judge, Justice Perell, simply

accepted the employer's own characterization of it, and found that this had no negative effect on the claim.

As for damages, Justice Perell found no problem determining a fair notice period without a trial. The judge went on to consider the jurisprudence as to the appropriate notice period for comparable situations, and was satisfied that the plaintiff's claim of 16 months was fair. He also awarded just over \$14,000 in costs, and pre-judgment interest. This was a very speedy resolution – the plaintiff was dismissed on Jan. 24, 2008 and won summary judgment less than six months later, on June 6, 2008. The speedy resolution of the action lead to an interesting problem. What happened if Ms. Adjemian found another job and mitigated her damages before the 16 month period was over? The trial judge answered as follows:

Although Ms. Adjemian is entitled to judgment, her judgment has come so quickly that it comes during the period in which she continues to have an obligation to mitigate. In these circumstances, the court can impose a trust requiring her to account for any mitigatory earnings. This approach...should be employed for this case.

The courts have used this summary judgment procedure in a number of notice period cases in the past year, including a series of actions against Canac Kitchens. Employers should expect more of these types of actions - resulting in more actions and quicker decisions.

#### What does this mean for employers?

The goal of all of these changes is to make the court system faster, less expensive and easier to navigate, especially for simple issues, or claims with small monetary value. Given that many wrongful dismissal actions involve less than \$100,000, these changes could make it easier for employees to sue their employer -and result in more claims being made. On the other hand, it might help keep costs down for employers who are trying to defend these actions.