FALL/WINTER 2006

CRAWFORD CHONDON & PARTNERS LLP

Management Labour and Employment Lawyers

THE EMPLOYERS' Edge

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Court of Appeal Reduces Punitive Damages Award from $500,000 to $100,000

In a previous edition of *The Employers' Edge*, we reported on a trial decision in which Honda Canada Inc. ("Honda") was ordered to pay the plaintiff, Kevin Keays ("Keays"), 24 months notice for being wrongfully dismissed by Honda and $500,000 in punitive damages. Honda appealed this decision and the Ontario Court of Appeal recently released its decision, with mixed news for employers.

Background Facts

Employed in Honda's Quality Engineering Department for 14 years, Keays developed Chronic Fatigue Syndrome ("CFS") for which he took disability leave in October 1996. In December 1998, the insurer terminated his disability benefits and Keays returned to work reluctantly. Keays was unable to maintain consistent attendance over the next two years due to his condition. In 2000, Honda sought to accommodate Keays' illness by finding alternative work arrangements and required Keays' to meet with its occupational medicine specialist to undergo an assessment. Keays refused and responded by hiring a lawyer who demanded that Honda clarify the purpose, methodology and parameters of the assessment. Honda reiterated its demand for the assessment and when Keays continued to refuse to meet the doctor, Honda terminated his employment for cause based on insubordination.

At trial, Justice McIsaac found that Honda did not have cause for dismissing Keays in the circumstances. Honda's order to meet the specialist was found by the trial judge to be unreasonable, given the information Honda already had regarding Keays' illness. Justice McIsaac found further that Keays' dismissal constituted discrimination and harassment under the *Ontario Human Rights Code* (the "Code").

It was found that a fifteen month notice period was appropriate given Honda's flat hierarchical and egalitarian approach to management. Further, it was found that a nine month extension of the notice period was appropriate given what was viewed by the judge to be Honda's bad faith conduct towards Keays. Finally, based on the judge's finding that Honda breached the *Code*, $500,000 was awarded for punitive damages.

Cause for Termination

Unfortunately for employers, the Court of Appeal agreed with Justice McIsaac that Honda did not have just cause to dismiss Keays for his refusal to meet with the com-

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pany doctor. In particular, Honda's order was found to be unreasonable, and even if it was not, dismissal was a disproportionate reaction to Keays' refusal to meet with the specialist.

The Court of Appeal also upheld Justice McIsaac's assessment of 15 months notice plus 9 months additional notice in the form of a "Wallace Bump". Of note, the Court of Appeal upheld the ruling that Honda's egalitarian management approach warranted a higher period of notice than may have otherwise been owed to an employee in Keays' position. In a perplexing part of the judgment, the Court of Appeal states that, "an employer who seeks a better, more efficient workplace, by instituting a structure that gives employees' responsibilities more equal worth, cannot expect to entirely escape the consequences of that fact when reasonable notice periods are assessed".

With respect to the nine month extension, the Court of Appeal appeared to endorse a rather liberal view of the scope of "bad faith damages" by finding that Justice McIsaac's rulings "properly ground the finding of bad faith in the appellant's course of conduct that culminated in its dismissal of [Keays]". In this regard, the Court of Appeal seems to suggest that bad faith on behalf of an employer may be imputed in events leading up to an employee's termination, as opposed to the final termination process itself.

Punitive Damages

The Court of Appeal agreed with Justice McIsaac that punitive damages were appropriate in the circumstances, but not to the tune of $500,000. The majority of the court found that a more appropriate award for punitive damages was $100,000. An 80% reduction of the original $500,000 award was appropriate because a lengthy extension of the notice period had already been given and many of the lower court's findings with respect to Honda's conduct simply did not hold up on closer examination. For example, there was no evidence that Honda's misconduct was "planned and deliberate and formed part of a corporate conspiracy". There was also no evidence that Honda had engaged in "outrageous conduct" over a five year period or that Honda's in-house counsel had breached any rules of professional conduct. Finally, there was no evidence that Honda intended to make an example of Keays by dismissing him or that it had benefited from its "misconduct because they rid themselves of an irritation".

Comment

Judicial treatment of the Keays case continues to be troublesome from a legal standpoint insofar as it continues the departure from established principles of employment and human rights law, which commenced with the trial decision. Particularly troublesome are the Court's comments on the relevance of flat hierarchical structures in calculating notice periods, its expanded application of "bad faith damages" and the award of punitive damages in circumstances that are not properly characterized as malicious, high handed or conspiratorial. To be sure, while some may view the reduction of the punitive damages award from $500,000 to $100,000 as a positive result, the award is still on the extreme end of the continuum for a wrongful dismissal case, and for conduct that would have otherwise appeared not to be deserving of punitive damages.

In the end, the decision clearly signals judicial determination to impose significant legal obligations on employers who are dealing with disabled employees and significant sanctions for employers who are found not to have lived up to those obligations. What is much less clear is what exactly is judicially expected of employers when dealing with disabled employees who are not able to maintain regular attendance and who are unwilling to support those absences with appropriate medical documentation or otherwise cooperate with the Company's efforts to get a handle on their attendance problems.

Crawford, Chondon & Partners LLP will continue to monitor this case and will provide updates in future editions of *The Employers' Edge*.

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Unionized Employees Must Pursue Sexual Assault and Harassment Claims Through Their Collective Agreement

A recent decision of the Ontario Court of Appeal indicates that behaviour such as sexual harassment and assault, that is otherwise compensable through the courts as torts, must be addressed through the remedial mechanisms in the collective agreement, where it applies. Unionized employees who are victims of such behaviour are precluded from pursuing their own tort actions in the courts.

In *K.A. v. Ottawa (City)*, two unionized employees sued their employer, OC Transpo, and the City of Ottawa, arguing that they were vicariously liable for the sexual harassment and sexual assault they suffered at the hands of another OC Transpo employee. OC Transpo and the City sought to dismiss the employees' court actions on the basis that the claims arose out of the collective agreement between the parties and should be handled by a grievance arbitrator.

OC Transpo and the City were successful at Superior Court in having the claims related to sexual harassment dismissed. However, the Court refused to dismiss the claims related to sexual assault, as it did not believe that they fell within the four corners of the collective agreement. OC Transpo and the City appealed this decision.

The Court of Appeal agreed with O.C. Transpo and the City, and held that the entire claim should be struck out. Specifically, the action for sexual assault was indistinguishable from the claims framed in sexual harassment. As such, both claims arose out of the collective agreement and were properly dealt with at arbitration. The Court based this conclusion on the fact that the *Canada Labour Code* did not prevent the arbitrator from dealing with claims of sexual harassment and sexual assault. As well, jurisdiction was derived from the collective agreement because the prohibition against sexual harassment contained in the *Canadian Human Rights Act* was incorporated into the collective agreement, even if the parties did not do so directly and explicitly.

In the end, the matter dealt with a workplace dispute and the fact that an arbitrator may award lesser damages than a court was an insufficient basis to bring the matter within the Court's jurisdiction. Significantly, an individual employee was also named as a defendant in the action, but the Court held that simply naming an employee of the employer as a defendant did not remove the dispute from the arbitrator's jurisdiction.

The Court of Appeal's decision confirms that the existence of a collective agreement will preclude many workplace related claims, from reaching the jurisdiction of the courts. Simply put, a unionized employee who is the victim of sexual harassment and assault, and who would otherwise have the ability to pursue a remedy in the courts, must use the mechanisms provided for in the collective agreement in order to obtain a remedy.

A Full and Final Release is a Bar to Pursuing a Pay Equity Complaint

The Divisional Court has recently confirmed that a full and final release executed as part of a wrongful dismissal settlement that provides that an employee "has no further claims of any description" against his/her employer will preclude an employee from bringing a complaint under the Pay Equity Act (the "Act"). In Better Beef v. MacLean Harriet MacLean filed a pay equity complaint after entering into a settlement relating to her termination from employment and executing a full and final release. In keeping with previous tribunal jurisprudence, both the Pay Equity Commission and the Pay Equity Tribunal took the position that the release did not act as a bar against Ms. McLean pursuing a remedy under the Act because the employer had not complied with the Act at the time the employee executed the release. The Divisional Court held that the release was clear and unambiguous and that compliance with the Act as a precondition to resolving issues arising from the termination of the employment relationship would "discourage the efficient resolution of employment issues" which would not be in the best interest of either the individuals involved or the public. This important decision underscores the need to obtain properly worded releases whenever payments are made to an employee at the time of dismissal.

The Company Holiday Event:

Are employers liable for injuries caused by their intoxicated employees?

With holiday festivities around the corner, attention invariably turns from number crunching and securing year-end results to planning the Company holiday party. For many employers, serving alcohol is part and parcel of planning an enjoyable and memorable event. However, in light of recent legal developments with respect to social host liability for guests' alcohol consumption, employers would be well advised to take precautions against employee drinking and driving.

The Supreme Court of Canada recently affirmed the Ontario Court of Appeal's decision in *Childs v. Desormeaux*, that a social host of a BYOB party does not owe a duty of care to its guests or third parties such that it would be required to prevent a guest from driving in an intoxicated state. The Court reasoned that although commercial hosts, such as taverns and bars, do have a duty to protect their guests and third parties, the situation of a social host is quite different. In particular, the commercial host is better able to monitor consumption through its servers; the sale and consumption of alcohol at a commercial establishment is regulated by legislation and the commercial owner profits from guests' consumption of alcohol while social hosts do not. The Court also reasoned that social hosts would not have a duty to interfere with a person's autonomy by preventing them from driving in an intoxicated state (for example by confiscating keys) in the absence of special circumstances. These "special circumstances" may arise in three situations: 1) where a person or business intentionally attracts and invites third parties to an inherent and obvious risk that the host has created or controlled; 2) where there is a paternalistic relationship between the host and guest; 3) where the host exercises a public function or engages in a commercial enterprise.

The Court suggested that a host who continues to serve alcohol to a visibly inebriated person, knowing that he or she will be driving home, may be liable for injuries to the guest or third parties. However, hosting a party where alcohol is served without more does not create that risk. The Court recognized that the consumption of alcohol and the assumption of the risks of impaired judgment are personal choices and guests remain responsible for their own conduct.

The *Childs* decision impliedly suggests that employers would likely be held to a higher standard than social hosts when alcohol is served at company sponsored events, given that the special circumstances which may result in the imposition of liability on a social host are more likely to be found in the context of a company holiday party. For example, to the degree that employers serve alcohol without restriction, require attendance of employees at the party and do not monitor or control visibly intoxicated employees' consumption of alcohol, courts are more likely to find employers liable for the injuries sustained by employees who are drunk or who have caused injuries to third parties. Unlike social hosts, employers are required to maintain a safe working environment for employees, a fact that further supports the imposition of a duty of care on employers.

In fact, prior to the *Childs* decision, in *Hunt v. Sutton Group Realty Inc.*, an employee was awarded $281,229 in damages against her employer after she drove home intoxicated after the office Holiday party and was injured in a car accident. Notably, the employee had consumed alcohol at the party while she was still on shift and being paid to perform her duties. In addition, prior to the car accident, the employee had left her employer's premises with co-workers, consumed more drinks at a local bar, and then attempted to drive home. The Court found that the employer's obligation to provide a safe work environment required it to take positive steps to prevent Ms. Hunt from driving home in an intoxicated state.

Given the Supreme Court's comments on the differences between a social host and a commercial host, its qualification that social host liability does not arise unless there are "special circumstances", the prior decision in Sutton, and an employer's unique duties respecting safety, there remains a significant risk that employers will be liable for the injuries of employees who drink excessively at a company function (and for any injuries those employees cause to third parties). As such, responsible employers are well advised to continue to take steps to minimize the risks of liability associated with employee drinking and driving. Some suggestions for providing a safe company event include the following:

- Provide an alcohol free event. This is certainly the lowest risk alternative.
- Do not provide free and open access to alcohol. This prevents an employer from effectively monitoring alcohol consumption.
- Keep track of how much alcohol employees are consuming. Issue a set number of tickets to limit the

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wish you all the best for the holidays
and a happy, safe and prosperous 2007

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consumption of alcohol. Advise employees in advance of the office function that they are not to drink or drive either to or from the event.

- Establish in advance which employees are to monitor alcohol consumption throughout the party. Advise all employees which persons will be serving as monitors. This will allow employers to monitor potential problems, facilitate proactive action when necessary and will encourage compliance by employees.
- Provide alternative transportation for employees either through car pools or taxi chits. Clear communication of these alternatives to the employees is crucial.
- Consider having the office party at or near a hotel and arrange for employees to reserve rooms for the night.

Despite the *Childs* decision concerning social hosts, the risk of liability for employers who permit employees to drive home intoxicated is too significant to ignore. Proactive planning and communication with employees will go a long way to ensuring that the office holiday party is enjoyable and safe for all, and that the risk of incurring liability is greatly minimized.

Alberta Court Finds Automatic Termination for Recreational Use of Marijuana Discriminatory

Caselaw surrounding the use of drug and alcohol testing by employers continues to evolve. A recent decision of the Alberta Court of Queen's Bench found that a pre-employment drug test that mandates automatic termination for a positive drug test, is discriminatory, even if the person testing positive is not disabled by drug addiction.

The facts are as follows. In June 2002, Mr. Chiasson was offered a position with Kellogg Brown & Root ("KBR") as a receiving inspector for a refinery expansion project in Fort McMurray, Alberta. Shortly after being hired, it was discovered that Mr. Chiasson had failed his pre-employment drug test, which revealed metabolites for marijuana. The grievor admitted to smoking marijuana six days prior to the test. There was no allegation that Mr. Chiasson had used drugs at work. Moreover, in the time that he was at work, the quality of his work was rated as excellent. Nevertheless, KBR terminated Mr. Chiasson's employment for violating its zero-tolerance pre-employment drug and alcohol testing policy.

Mr. Chiasson complained to the Alberta Human Rights and Citizenship Commisison that KBR's actions violated Alberta's *Human Rights, Citizenship and Multiculturalism Act* (the "Act"), by discriminating against him on the basis of disability. Mr. Chiasson conceded that he was simply a recreational user

of marijuana and did not suffer from an addiction to the drug, which would be considered a disability under the Act.

The Tribunal found that Mr. Chiasson was unable to establish a *prima facie* case of discrimination given his admission that he was only a recreational user and did not suffer from a disability; and the fact that KBR did not perceive or subjectively believe that Mr. Chiasson suffered from a disability. Nevertheless, the Panel found that the use of pre-employment drug testing by KBR was *prima facie* discriminatory against drug dependent individuals generally and could not be justified as a bona fide occupational qualification (BFOQ) pursuant to the test in *Meiorin* laid down by the Supreme Court of Canada.

Mr. Chiasson appealed the Panel's finding that KBR did not perceive him to be disabled, arguing that because its policy mandated automatic termination of employment for the failed drug test, he was treated as though he were disabled, and was therefore entitled to protection under the Act.

The Alberta Court of Queen's Bench agreed with Mr. Chiasson, finding that he was entitled to protection under the Act because the policy treated him as though he were disabled by drug addiction. In this regard, the Court accepted the reasoning and analysis in the Ontario Court of Appeal's decision in *Entrop v. Imperial Oil* that social drinkers and casual drug users are entitled to protection under the *Ontario Human Rights Code* if they are sanctioned for a positive drug or alcohol test, because they are effectively being treated as *though* they are disabled by addiction.

The Court rejected the view that KBR did not perceive Chiasson to be disabled because the employees who terminated Mr. Chiasson did not subjectively believe that he was drug dependent. The Court held: "the focus should not be on whether particular employees thought Mr. Chiasson to be drug dependent, but whether, by the plain reading and clear operation of the company policy, KBR assumes him to be". A zero tolerance policy with no provision for individual assessment or accommodation effectively assumed Mr. Chiasson to be disabled.

To be clear, drug and alcohol addicted persons receive protection under human rights legislation because they are stigmatized by the stereotypical assumption that they will show up to work impaired and be unable to perform the job or present a health and safety risk. Employers are not entitled to terminate the employment of such disabled individuals because accommodation may be effective in allowing the person to perform the requirements of the job. Where a non-disabled person is terminated from employment because metabolites for marijuana are revealed in a drug test, the stereotypical assumption applied to disabled persons is applied to the non-disabled person and he is effectively treated as though he was disabled.

Finally, the Court found that the policy of zero tolerance for a positive drug test could not be justified under the *Meiorin* test. Although the policy was adopted in good faith to ensure a safe workplace it was not reasonably necessary to achieve the company's objective of ensuring safety in its operation.

The Chiasson case is significant because it gives further support to the view that zero tolerance policies for employees or applicants who test positive for drug metabolites are not justifiable under human rights law. An employer who believes that drug testing is necessary to preserve safety in the workplace are well advised to implement a policy that contemplates accommodation for disabled applicants and employees, and which contains measures less stringent than automatic termination.

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