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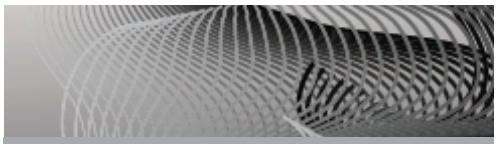
CRAWFORD CHONDON & PARTNERS LLP

Management Labour and Employment Lawyers

THE EMPLOYERS' Edge



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Suite 430, 2 County Court Blvd.
Brampton, ON L6W 3W8
Tel: 905-874-9343
Fax: 905-874-1384

info@ccpartners.ca
www.ccpartners.ca

Amendments to the Human Rights Code Will Significantly Impact Employers

There has been a great deal of discussion over the last year about Bill 107, the Ontario government's legislation to amend the Ontario Human Rights Code (the "Code"). After much feedback and many revisions, Bill 107 was passed in December 2006 and became the Human Rights Code Amendment Act, 2006. When Bill 107 comes into force, it will significantly impact employer practices in a number of areas. In preparation for these changes, we discuss the following three key amendments to the Code and their implications for employers:

- The changing role of the Ontario Human Rights Commission (the "Commission");
- The possibility of multiple concurrent proceedings; and
- The increased scope of remedies available to complainants.

Changes to the Role of the Commission

Currently, the Commission has a significant gatekeeping role with respect to complaints that are filed. The Commission receives the complaint and decides whether to investigate and/or whether to refer the complaint to the Ontario Human Rights Tribunal (the "Tribunal"). Generally, a significant amount of vetting takes place before anything is moved up to the Tribunal level. In fact, currently the Commission only refers about 4% of complaints to the Tribunal for a hearing.

Under Bill 107 the Commission will no longer serve this function. Instead, a complainant will file his or her complaint directly to the Tribunal. The Commission will not initiate or investigate (at least at the initial stages) any complaint that comes to the Tribunal.

The Commission's role will be focused on developing human rights policies, educating the public and, where necessary, conducting inquiries into significant complaints which have a public interest aspect. The Commission also has the power to initiate its own inquiries, with significant investigative powers.

Multiple Proceedings

The "direct access" approach under Bill 107 will likely be viewed by employees as a more direct route to compensation and restitution than going through the Commission's current lengthy review and investigation process. The mere perception that the new complaint process is more streamlined is likely to lead to more complaints being filed by employees.

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In addition, Bill 107 affects employees' rights to begin proceedings in more than one forum (e.g. a human rights complaint at the Tribunal, grievance/arbitration under a collective agreement, civil litigation).

On one hand, the Bill 107 amendments specifically recognize the individual's entitlement in a court proceeding (e.g. a wrongful dismissal case) to claim damages for violations of his or her human rights and to seek the same relief that may be available in a proceeding before the Tribunal. However, when an individual pursues such a claim, he or she will be barred from bringing an application to the Tribunal, even if the court case has yet to be finally determined.

On the other hand, unionized employers can expect to face increased instances of multiple proceedings. There is nothing to prevent an employee in a unionized setting from filing a grievance and, at the same time, making an application for a hearing before the Tribunal. Further, it is possible that even an arbitrator's final decision on a grievance may not be a bar to a full hearing of an application to the Tribunal. This is because Bill 107 requires the Tribunal to at least consider whether the arbitration decision has "appropriately dealt with the substance of the application" before dismissing an application.

Increased Damages

Employers can expect to face greater damage awards under Bill 107. Along with removing the current $10,000 cap on damages for mental anguish, the Bill 107 amendments provide for a possible penalty of up to $25,000 for general violations of the Code as well as possible orders related to an employer's "future practices" of the employer. These remedies also have been extended to civil court proceedings.

What Bill 107 Means for Employers

Every complaint that an employer receives will need to be handled with the understanding that litigation at the Tribunal is a real possibility. Employers would do well to establish and/or amend policies and procedures with respect to human rights issues in the workplace to enable the thorough investigation, response and preparation that will be necessary to defend allegations of human rights violations before the Tribunal.

Unionized employers can expect increased litigation and, therefore, increased costs related to multiple proceedings. One mechanism to reduce costs for unionized employers facing multiple proceedings will be to bring a motion to the arbitrator for the deferral of the arbitration proceeding pending the human rights matter being dealt with by the Tribunal.

The Bill 107 amendments are significant. A thorough review of current employment policies and practices will ensure that employers are best prepared to face the challenges these changes may bring.

Surreptitious Videotaped Surveillance Obtained by an Employer Admissible as Relevant and Probative Evidence

A claims and insurance coordinator grieved the termination of her employment in March 2005. Her employment was terminated after her employer determined, by reviewing surreptitious video surveillance obtained by a private investigator, that the grievor was abusing her sick leave entitlements. Two days of video surveillance revealed that the grievor was engaged in office work in the reception area of her husband's plumbing business.

During arbitration, the union objected to the admission of the videotape evidence on the basis that the surveillance constituted an unreasonable infringement of the grievor's right to privacy. According to the union, whether or not video surveillance evidence is admissible requires a balancing of an employee's right to privacy and the employer's right to protect its business interests. The employer argued that the video surveillance evidence was relevant and probative and the arbitrator was required to admit it and ultimately weigh it together with all the other evidence when making his decision.

The Arbitrator specifically rejected the union's argument, which had been supported by arbitrators in other cases, that arbitrators generally have the discretion to refuse to consider video surveillance evidence and must specifically balance the interests of the employer and the employee in making this decision.

According to the Arbitrator, the most important consideration an arbitrator must make with respect to the admission of evidence is whether excluding it will negatively affect the fairness and credibility of the hearing, thereby making it susceptible to judicial review. The Arbitrator found that the video surveillance evidence in this case was relevant to the allegation that the grievor had abused her sick leave, and that to exclude it would be unfair to the employer and an inappropriate exercise of the arbitrator's authority.

This case should prove useful in allowing employers to admit evidence of video surveillance at grievance arbitrations. If you have any questions about an employer's ability to conduct video surveillance of an employee's off duty or on duty conduct, please contact any one of our lawyers.

Did you know?

The Ontario Human Rights Code prohibits discrimination against individuals who have a "record of offences" which have been pardoned. This means that employers cannot refuse to hire persons because they have a pardoned criminal conviction unless prohibiting such a refusal would cause the employer undue hardship.

Notably absent from the definition of "record of offences" are those individuals who have received an absolute or conditional discharge with respect to the crimes they have committed. In either case, the individual concerned is considered "guilty" of a Criminal Code offence. The difference between an absolute and conditional discharge is that the latter is subject to conditions which, if met, will not result in a "criminal record". An absolute discharge is not subject to any conditions at all.

What is significant is that police agencies do report the presence of absolute or conditional discharges on a person's record, for a period of one year after an absolute discharge and three years after a conditional discharge. The absence of a prohibition in the Ontario Human Rights Code and Canadian Human Rights Act related to absolute or conditional discharges suggests that employers can rely on such information to deny employment without any adverse human rights consequences.

Although there are no reported decisions in this area as of yet, it is possible that the caselaw could evolve to prevent the reliance upon such information in making employment decisions. Until then, however, employers likely have some scope to use absolute or conditional discharge information.

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Random Drug Testing by Way of Saliva Sample Prohibited for Safety Sensitive Unionized Employers

In our Fall 2006 edition of *The Employer's Edge*, we reported on the *Chiasson* case, an Alberta court decision in which it was found that employers cannot summarily terminate the employment of employees who test positive for marijuana metabolites in a pre-employment screening test.

In this edition, we report on a recent arbitration decision, *Imperial Oil v. CEP*, which found that randomly testing employees for marijuana impairment by way of a saliva swab is not permitted, except in exceptional circumstances.

Imperial Oil had a program of random drug testing for approximately nine years until 2001 when the Ontario Court of Appeal ruled in *Entrop v. Ontario Human Rights Commission* that random drug testing by way of urinalysis could not be justified in a safety sensitive environment. This was because urinalysis, unlike a breathalyzer test for alcohol impairment, could only determine the presence of drug metabolites in the blood which could only determine whether the person tested had taken a narcotic in the past, not whether they were actually impaired at the time of the test. On this basis the Court of Appeal held that, random drug testing by way of urinalysis could not be justified as a "bona fide occupational requirement" because it was not "reasonably necessary" to further the goal of protecting workplace and public safety.

In 2003, Imperial Oil reintroduced random, unannounced cannabis testing for safety sensitive positions by means of saliva samples. The process involved the removal of saliva from the employee's mouth by way of a swab. In the Company's view, this test was consistent with the Court of Appeal's decision in *Entrop* because it was effective and accurate in determining present impairment for cannabis, unlike urinalysis. It was also the company's view that, unlike urinalysis, the saliva test was unobtrusive because it was quick, painless and required only a small amount of saliva.

The company's reintroduced policy also provided for reasonable cause alcohol and drug testing as well as for post-incident alcohol and drug testing. In both of these circumstances, the policy would call for a urinalysis test. While the oral drug test would only detect cannabis, urinalysis could test for a broader range of drugs including alcohol, cannabinoids, cocaine, amphetamines, opiates, and other specified drugs.

Issue

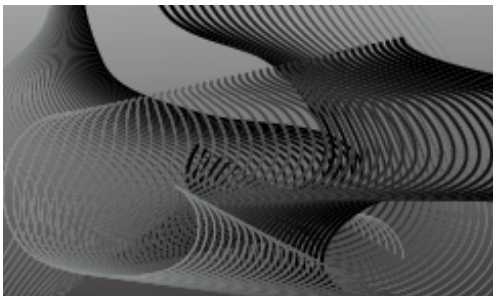
Whereas the issue in *Entrop* and *Chiasson* concerned whether or not the drug testing constituted unjustified discrimination on the basis of disability under the *Ontario Human Rights Code*, the *Imperial Oil* decision was concerned with whether or not the Company's random, unannounced drug testing by way of saliva sample was a violation of the collective agreement which required the company to treat employees with "respect and dignity".

The Arbitrator found that Imperial Oil was not authorized under its collective agreement to conduct random, unannounced saliva testing for the following reasons:

- Imperial Oil would not know the test results until several days after a lab in Houston returned the test results, so an impaired employee could be sent immediately back to work in a safety-sensitive position after taking the test.
- In 15 years, the company had not had a single case of an employee being impaired by drugs at work, and the Arbitrator noted that there was no evidence of any significant degree of cannabis used among the workforce.
- In applying the "balancing of interests" approach in which the employer's interest in maintaining a safe environment is weighed against the employee's right to privacy, respect and dignity, the Arbitrator found that employers have been entitled to test employees for drugs in only two circumstances: where the employer's industry is safety-sensitive and the employer has reasonable cause to conduct the test; and where an employee is undergoing rehabilitation for an acknowledged alcohol or drug use problem, and then only for a limited period of time.
- The Arbitrator found that Imperial Oil's general, random unannounced drug testing would only be permissible in extreme circumstances, such as where there is an out-of-control drug culture taking hold in a safety-sensitive workplace.

Announcements

The lawyers and staff at Crawford Chondon & Partners LLP are pleased to welcome Erin Schleyer as our Receptionist/ Administrative Assistant and Dana L. Dingman as an Articling Student.



Upcoming Events

March 27, 2007
Justin K. Diggle
"Cross-Border Employment Issues Between Canada and the U.S." Clark Hill PLC's 23rd Annual Labor and Employment Conference
Detroit, Michigan

April 4, 2007
David M. Chondon
"Freedom of Expression in the Workplace: Pushing the Envelope" Lancaster House, Human Rights, Accommodation and Privacy Conference 2007
Toronto, Ontario

April 24, 2007
Laura K. Williams
"Hot Employment Law Topics" CNCP
Toronto, Ontario

May 8, 2007
"5th Annual Labour and Employment Law Forum"
Brampton, Ontario
(see page 2 for details)

May 16, 2007
Karen L. Fields
"Terminations of Employment Recent Developments" &
"Occupational Health and Safety Know Your Rights When the Ministry Arrives"
Canadian Wireless Telecommunications Association
Toronto, Ontario

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- The Arbitrator also found that the Court of Appeal in the *Entrop* case could not be relied upon by Imperial Oil to justify the drug testing because that decision was exclusively concerned with the rights and obligations of an employer under the Ontario Human Rights Code, which requires a different analysis and did not deal with an employer's obligation under a collective agreement to treat employees with respect and dignity.

The recent decision in Imperial Oil clearly indicates that arbitrators are unwilling to allow employers in safety-sensitive unionized workplaces to conduct random, unannounced drug testing, even if the test is capable of determining whether an employee is impaired by narcotics at the time of the test. On the other hand, random, unannounced testing for cannabis by way of a saliva swab may be permissible in safety-sensitive non-unionized workplaces given that a scientifically acknowledged test for impairment is now available. The case also confirms that random drug testing is acceptable in safety-sensitive environments where an employee is on a return-to-work/rehabilitation program, or where the employer has reasonable cause.

Crawford Chondon & Partners LLP will continue to monitor this important and evolving area of the law.

A Tax by any other name .....continued

The Ontario Health Premium ("OHP") was introduced in June 2004. Since its implementation Crawford, Chondon & Partners LLP has followed developing case law surrounding the OHP and has provided updates in past issues of *The Employers' Edge*. Arbitrators and courts have wrestled with the question of whether the OHP is properly characterized as a tax and deductible from an employee's wages, or a premium such that collective agreement obligations on employers to pay OHIP premiums apply to the OHP.

On December 8, 2006, the Ontario Court of Appeal released a set of 5 decisions that reviewed the Divisional Court's affirmation of 6 arbitral awards (2 of the awards were grouped together on appeal to Divisional Court). While 4 of the arbitral awards were in favour of the Union's interpretation and only 2 in favour of the Employer's interpretation, the Court of Appeal upheld each decision. Essentially, the Court of Appeal has affirmed that the courts will defer to the expertise of arbitrators in dealing with collective agreement language in respect of the OHP.

However, the troubling aspect of these decisions for employers can be found in the Court of Appeal's comments with respect to the "correctness" of the decisions. Specifically, with respect to the lead decision of *Lapointe-Fisher Nursing Home* the Court said that the OHP was significantly similar to the old OHIP premium which was the subject of the various collective agreement provisions at issue.

While the Court of Appeal has clearly upheld the jurisdiction of arbitrators to interpret and apply the language of collective agreements with respect to the OHP, more significantly it has also weighed in on what the judicial interpretation of the OHP should be: a premium, rather than a tax.

Accordingly, this group of decisions is not only important for those employers who have agreements with old OHIP language but, as noted in previous editions of *The Employers' Edge*, employers should definitely exercise caution when faced with Union demands for new language dealing with health premiums of any sort.

Harassment and Bullying

Not just human rights issues

A recent decision of the British Columbia Court of Appeal highlights the risks employers face when their policies and/or practices are ineffective in preventing workplace harassment and bullying that cannot be characterized as human rights issues.

After commencing employment with the RCMP in 1988, Sulz was regarded as an exemplary general duty officer. However, her treatment at work changed in 1994 after Staff Sergeant Smith, became the new detachment officer and Ms. Sulz' direct supervisor. She was also subject to the direction of two corporals.

After Sulz was put on light duties as a result of a pregnancy in July 1994, Smith became openly hostile and verbally abusive towards Sulz and allowed others, including one of the corporals, to do the same. Over the next year and a half, Sulz experienced psychological harassment and bullying by Smith and a corporal, which included derogatory public comments about her abilities as well as Smith's deliberate sabotage of her efforts to transfer to another unit. As a result of this conduct, Sulz felt ostracized by Smith and others in the department. She lost weight, was unable to sleep, was diagnosed with a major depressive disorder and went on doctor ordered sick leave in February 1996. Smith telephoned Sulz's doctor to challenge his diagnosis. He also suggested that the doctor may have been manipulated by Sulz. In the fall of 1997, a new Staff Sergeant reported concerns about the conduct and history of Smith and this resulted in a formal investigation. The investigation concluded that Sulz had been discriminated against, but that disciplinary measures could not be taken because Smith had retired before the investigation had been finalized. Sulz remained on sick leave until March 8, 2000 when she agreed to a medical discharge from the RCMP.

Sulz sued Smith, the provincial government and others for breach of contract, intentional infliction of mental suffering and negligent infliction of mental suffering. At trial, it was found that Smith had committed the tort of negligent infliction of mental suffering against Sulz. The Court held that Smith had engaged in "harassing conduct" including "angry outbursts" and "intemperate and at times unreasonable behaviour" which caused serious emotional problems and a troubled work environment for Sulz. The trial judge found further that the harassment which Sulz experienced in 1994 and1995 was the cause of her depression which ended her career with the RCMP, and which continued to affect her personal life through to the time of the trial.

The trial judge found against the provincial government and awarded Sulz $125,000 in general damages, $225,000 for wage loss and $600,000 for future wage loss for a total of $950,000. The provincial government appealed the trial court's decision, but the Court of Appeal upheld the trial court's findings of harassment and intentional infliction of mental suffering and the award to Sulz of $950,000.00.

The *Sulz* decision underscores how important it is for employers to be proactive in protecting their employees from harassing, bullying conduct by supervisors. While such conduct may not qualify as harassment or discrimination pursuant to human rights legislation, the *Sulz* case confirms that tort remedies are available to employees and can result in considerable financial liability for employers. Employers are strongly recommended to implement anti-bullying policies which promote a respectful work environment and productive management practices.

Our Lawyers

Experience • Expertise • Exceptional Service

David M. Chondon
dchondon@ccpartners.ca

Karen L. Fields
kfields@ccpartners.ca

Susan L. Crawford
crawford@ccpartners.ca

Jayson A. Rider
jrider@ccpartners.ca

Laura K. Williams
lwilliams@ccpartners.ca

Justin K. Diggle
jdiggle@ccpartners.ca

Rishi Bandhu
rbandhu@ccpartners.ca

A. Kelsey Orth
korth@ccpartners.ca