Labour & Employment Law News

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Borden Ladner Gervais LLP

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Labour & Employment Law

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Editor's Message

This edition of the *Labour & Employment Law News* addresses social networking policies, a recent case dealing with the category of dependent contractors, and the Ontario Human Rights Commission's new guidelines for collecting human rights information. In addition, an article detailing changes to immigration laws, making it easier for employers to hire international graduates, is featured.

Also, check out our new "Hot off the Press" column keeping you informed of breaking legal developments.

We trust you will find that this newsletter provides you with critical information relevant to managing your employees in today's environment. If you have a matter you would like addressed in a future edition, please call or email us directly.

Jennifer M. Fantini
Tel: (416) 367-6176
Fax: (416) 682-2816
jfantini@blgcanada.com

Naomi E. Calla
Tel: (416) 367-6129
Fax: (416)361-2720
ncalla@blgcanada.com

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ANNOUNCEMENTS

We are pleased to announce the addition of a new associate, Alka Kundi, to our Vancouver office. Welcome Alka!

Hot Off the Press

Leave to appeal granted to Bank of Nova Scotia in overtime class action certification

The Bank has successfully appealed a decision of an Ontario Court judge to certify a proposed class in *Fulakwa and the Bank of Nova Scotia*. The motion judge in the Bank's application for leave to appeal determined that the case could not be reconciled with *Fresco v. CIBC* (where the proposed class was refused certification), and found that the test for leave to appeal had been met.

Bill 168 soon to be in effect.

The Act to amend *Ontario's Occupational Health and Safety Act* with respect to violence and harassment in the workplace will become law on June 15, 2010. If you haven't done so already, employers would be wise to ensure that violence and harassment policies are in place which are compliant with the legislation. In addition, risk assessments must be conducted, and programs and training should be put in place before that important date.

Restraint Act Receives Royal Assent

Further to our most recent alert on the *Public Sector Compensation Restraint to Protect Public Services Act, 2010* (the "Restraint Act"), please be advised that the Restraint Act received Royal Assent on May 18, 2010 and, as an Act of Parliament, is now in force. Pursuant to section 22 of the *Restraint Act*, it is deemed to have come into effect on March 25, 2010.

While the *Restraint Act* is now Schedule 24 of Bill 16 (formerly Schedule 25), its substance was not significantly changed during Final Reading. Notably, the only substantive change is the enumeration of public sector employers exempt from the *Restraint Act* pursuant to section 3(3). Specifically, local boards of health are now subject to the application of the *Restraint Act*.

Policies for Social Networking and Blogs

Online blogs and social networking websites such as Facebook, MySpace, Twitter and LinkedIn have become an essential part of many people's personal lives. However, unlike many "off-duty" activities, the public nature of internet communications makes employers particularly vulnerable to harm from employees' inappropriate online behaviour. Many employers have become understandably concerned about employees making negative or disparaging comments about them, or that the online activities of their employees may threaten to affect their reputation or business interests.

For example, in a recent case,[1] an employer terminated an employee after it discovered that his blog contained racist and offensive comments glorifying Nazi Germany. In the resulting grievance, the arbitrator found that there was a connection between the blog and the individual's employment, because he had mentioned the employer and posted photos of himself at work. However, as the blog postings were not

[1] *EV Logistics v. Retail Wholesale Union, Local 580 (Discharge Grievance),* [2008] B.C.C.A.A.A. No. 22 (Laing).

directed at his employer or co-workers, and as the employee had apologized and removed the hateful comments, a suspension was substituted for termination. In another case,[2] an arbitrator upheld the discharge of a government employee who had made negative comments about her employer and co-workers, including posting confidential information and referring to her co-workers as "aliens" and her workplace as a "lunatic asylum."

While off-duty online conduct may justify discipline in certain circumstances, it is always preferable to have policies that directly address social networking and blogs. In developing such policies, employers should consider including provisions that:

- Remind employees that online communications can be read by anyone (including their employer and co-workers);
- Reiterate the employee's duty of loyalty to the employer, and any applicable policies concerning harassment, intellectual property, IT/computer use, conflicts of interest and privacy;
- Prohibit employees from:
  - o Using company-owned resources for social networking or blog activities while at work;
  - o Disclosing any confidential information, including information relating to other employees or customers;
  - o Posting material that may violate the privacy rights of other employees, including photographs or videos taken at work or company social events;
  - o Publishing any negative comments about the employer or other employees, or any comments that may negatively affect the employer's reputation;
- Advise employees that if they refer to any aspect of a company's business, they must clearly identify themselves as an employee of the company, and include a disclaimer that the views are their own and not the employer's; and
- Expressly warn employees that any breach of the policy may result in discipline up to and including termination.

Employers should also advise employees that if they have any questions concerning the appropriate use of social networking or blogs with respect to their employment, they should raise these with their supervisor or manager.

As always, it is important to have policies that expressly outline the employer's expectations concerning these issues, as otherwise, an employee can always claim that he or she did not understand that off-duty online activities were related to his or her employment. Given the extraordinary power of online tools, and the significant – and immediate – damage to an employer's reputation that inappropriate postings may cause, it is essential that employers revisit their existing IT and computer use policies, and consider including these provisions.

Peter Eastwood
Tel: (604) 640-4046
Fax: (604) 622-5828
peastwood@blgcanada.com

[2] *Alberta Union of Provincial Employees v. Alberta (R. Grievance),* 174 L.A.C. (4th) 371 (Ponak, Bartee and Workman), rev'd on other grounds 2009 ABQB 208.

Employees, Independent Contractors and Dependent Contractors: Are Dependent Contractors Entitled to Reasonable Notice of Termination?

Companies are generally aware that their workers will either be classified as employees or contractors and that both have different rights and responsibilities in terms of matters such as taxation and the manner in which the relationship may end. One of the major differences between employees and contractors relates to the manner in which the work relationship can be terminated by the employer or the principal. While employees potentially have the right to common law reasonable notice on the termination of their employment, independent contractors generally do not. However, companies need to be aware of a third category which has been present in case law for some time and has obtained more publicity of late: the dependent contractor. A "dependent contractor" could, in certain circumstances, have the common law right to reasonable notice.

The difference between these three categories of worker (employee/independent contractor/dependent contractor) was recently explored in the Ontario Court of Appeal case of *McKee & Bribet Holdings Inc. v. Reid's Heritage Homes Ltd.*[1] (the "McKee case").

The McKee Case

Elizabeth McKee was a real estate salesperson who had been working for Reid's Heritage Homes Ltd. ("RHH") for about 18 years when her work relationship terminated without any notice or payment in lieu of notice.

[1] 2009 ONCA 916.

Ontario Superior Court

The trial judge determined that she was an employee, and was entitled to common law reasonable notice awarding her damages in lieu of notice equal to 18 months, in the amount of $402,500.00. RHH appealed to the Ontario Court of Appeal.

Ontario Court of Appeal

The main issue in the Court of Appeal was whether Ms. McKee was an employee or a contractor. RHH argued that Ms. McKee was not an employee and was therefore not entitled to reasonable notice.

In its judgment, the Court of Appeal specifically recognized the existence of a third category of worker (the dependent contractor) and held that a dependent contractor can be "defined by economic dependency in the work relationship requiring, inter alia, some reasonable notice of termination".

The Court of Appeal held that, in deciding which of the three categories of worker an individual falls into, courts should take the following approach:

1. ***Initial Step – determine whether the worker is a contractor or an employee***

At this stage, exclusivity (i.e. the fact that the worker may have only worked for one "employer") is just one of many factors which need to be taken into account. The Court of Appeal affirmed the *Sagaz/Belton* analysis[2] which stated:

Sagaz

"The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks."; and

Belton

There are five principles to consider in determining employee/contractor status i.e. whether or not:

(1) The agent was limited exclusively to the service of the principal;

(2) The agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold;

(3) The agent has an investment or interest in what are characterized as the "tools" relating to his service;

(4) The agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission;

(5) The activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?

Under this analysis, the individual will either be an employee or a contractor. If the individual is a contractor, the next step is to determine if he or she is an independent or a dependent contractor.

2. *Next Step (only required if the worker is a contractor) – determine whether the contractor is independent or dependent*

In making this assessment, a worker's exclusivity is determinative as it demonstrates economic dependence. Applying Step 1 of this analysis, Ontario Court of Appeal decided that McKee was an employee based on the following factors:

- McKee worked exclusively for RHH;
- McKee was subject to RHH's control as to where and what to sell, how much to sell for and promotional methods to use;
- McKee's "tools" were the homes, stationery and forms, all provided by RHH;
- McKee had no expectation of profit beyond her fixed commissions; and
- McKee was a crucial part of the sales force and the sales force was a crucial part of RHH's operation.

The finding of an employment relationship left open the question of whether, if McKee had been a dependent contractor, she would have been entitled to the full 18 months notice, or would "reasonable" notice be less for a dependent contractor than it would be for an employee? This issue has been left for another court to decide on another day.

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[2] Analysis taken from *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.R. 983 and *Belton v. Liberty Insurance Co. of Canada* (2004), 34 C.C.E.L. (3d) 203.

Practice Tips

1. ***Deal with Termination Issues in an offer letter or contract.*** Regardless of the person's status, the company should almost always enter a written agreement with a stipulated termination clause addressing with the amount of notice the individual is entitled to on termination. If there is a chance that the individual is an employee, then the company should make sure that the notice period is at least equal to the statutory minimum notice the employee would be entitled to under the relevant Employment Standards legislation. Also, make sure the contract is signed <u>before</u> the individual begins work to ensure maximum enforceability.

2. ***Renew Expired Agreements.*** In the McKee case, the original agreement did deal with termination and provided for a 30 day notice period. However, the original agreement was for a fixed number of homes sold and the court held that the agreement, along with the 30 day notice period, expired in the late-80s. It is important for all parties to have certainty by ensuring that if an agreement is for a fixed period or specific project, a new agreement is signed before the end of that period or project. In this case, RHH's failure to do so ended up costing it about $380,000 in damages above and beyond what payment under the 30 day notice period would have cost.

Duncan Marsden
Tel: (403) 232-9722
Fax: (403) 266-1395
dmarsden@blgcanada.com

"Count me in" – Best Practices for Collecting Human Rights Information

A growing number of businesses, public sector and non-profit employers are finding that collecting data about employees' personal characteristics can play a useful and often essential role in creating strong human rights and human resources strategies. Employers, however, have been reluctant to accumulate information about their employees, fearing that such practices might raise the ire of the Human Rights Tribunal.

To address this paradox, in March 2010, the Ontario Human Rights Commission (the "Commission") launched ***Count me in!***, a new guide that provides a framework for collecting human rights-based data in a wide variety of sectors across Ontario.

The guide recognizes that collecting information about characteristics based on *Code* and non-*Code* grounds may lead to fears that the information be used to treat a person or a group of individuals in a discriminatory manner, result in affirmative action or lead to individuals being unwillingly indentified or "outed." To dispel these concerns, the guide recommends the following best practices for ensuring that data involving *Code* and non-*Code* grounds is collected and used in a legitimate and appropriate fashion:

1. Collect Data for a Code-consistent purpose

Any data collection program should clearly set out a purpose for collection that is consistent with the *Code*. A data collection program may be initiated as part of an organization's obligation to consider persons suffering from historical disadvantage or as part of a review of the efficacy of human rights policies.

2. Inform the Public

Regardless of the method used for data collection, persons from whom data is being collected should be advised of why the information is being gathered, its potential uses, the benefits of collecting data and the ongoing progress of achieving the identified collection purpose.

3. Consult Affected Communities

Employers and service providers should consult with affected communities about the need for data collection and the appropriate methodology for doing so. This step is most applicable to organizations conducting external surveys and focus groups.

4. Use the Least Intrusive Means

The data collection method should be the least intrusive alternative that most respects the dignity and privacy of individuals. The guide suggests the use of self-identification surveys as an unobtrusive means of collecting data so long as participation is voluntary.

The guide further suggests the use of a trained individual to observe the organization and record characteristics and behaviour. Such an individual, however, may be only able to observe characteristics that are readily visible (i.e. race).

5. Ensure Anonymity

Assuring anonymity of the individuals from whom data is collected may be necessary to address privacy and confidentiality concerns, particularly where the collective results are so small that reporting them could potentially reveal an individual's identity. The guide notes, for example, that statistics may need to be suppressed in a small organization where only one individual has a *Code*-protected characteristic.

6. Distinguish Between Collection, Use and Disclosure

In undertaking a data collection initiative, there should be a rational connection between the nature of the information collected and its

intended use. The guide recommends that data be collected in a way that removes any identifying information such as an individual's name and should be kept separate from any other records that contain personal identifying information, unless it is being used to determine a person's eligibility for a special program. Data collection procedures, storage access and disclosure must always be carefully controlled and respect the dignity of individuals from whom data was collected.

7. Information and Privacy

In addition to collecting data in a *Code* consistent manner that respects the dignity of affected individuals, all data collection practices must comply with freedom of information and privacy protection legislation.

The guide provides case studies of organizations such as KPMG and TDSB, that have used data collection to create a more equitable and inclusive work environment. As Chief Commissioner, Barbara Hall has said, "you can't solve human rights problems without all the information." The purpose of the guide is to ensure the collection and use of data in the right context and pursuant to the right methodology. Adds Hall, "Collecting human rights-based data can help, whether you're looking for indications of racial profiling or for opportunities to expand to new markets. Each of our partners agrees that this kind of information is the right thing, and also the smart thing, to collect."

Wendy Litner
Tel: (416) 367-6039
Fax: (416) 361-7318
wlitner@blgcanada.com

Hiring International Graduates of Canadian Universities and Colleges

Many Canadian employers draw on the talented pool of graduates who have come to Canada to study as foreign students and then choose to stay in Canada to work. Only a few years ago, Canada made it quite difficult to employ foreign grads. A grad could relatively easily obtain a one year work permit for a job within her/his field of study, but staying in Canada beyond that one year was difficult. This situation caught many employers by surprise, and employers were not happy when employees who they had trained and come to rely on over the course of a year could not continue in their employ.

Eventually, Canada had a change of heart about foreign grads. Instead of sending the grads home to their countries of origin with their new skills and experience, Canada changed the system and made it easier for foreign grads to stay and work in Canada, and eventually to immigrate. This was part of a new take on immigration, wherein it was recognized that while Canadian employers sometimes have difficulty assessing foreign credentials and experience, and therefore hesitate to hire immigrants trained outside of Canada, Canadian employers were anxious to hire the many foreign workers who had been educated in Canada. According to generally accepted statistics, by 2012, all growth in Canada's labour market will come from immigration; so Canada had to figure out how to attract and keep workers that employers wanted to employ.

At first, Service Canada changed its program to

allow for extensions of the one year work permits, by giving Labour Market Opinions[1] without requiring that employers try to replace their "foreign worker" with a Canadian citizen or permanent resident. This "relaxation" of the local recruitment rules was helpful for employers, but was applied unevenly and was not a complete solution to the problem.

The next step taken was that Citizenship and Immigration Canada (CIC) offered lengthier post graduation work permits to foreign students who had studied in Canada for longer periods. CIC would grant work permits valid for up to three years to students who had studied in Canada for three or more years. A course of study of eight months to one year could yield a one year work permit, and two years of study could yield a two year work permit.

An additional change made was that the work permits were "open" – such that the grad could work for any employer, in any field, and could change employers without administrative or other hassles or delays. This was also a welcome change for both employers and the graduates. However, these "open" work permits caused headaches for employers in Ontario, who found that their employees on "open" work permits somehow became ineligible for OHIP. Several months passed before this unanticipated consequence of the program was remedied.

Finally, Canada introduced programs (some of which are provincially run) which fast-track the permanent residence applications of foreign students/grads. Again, understanding that the labour market's growth will come through immigration, and that the labour market most readily accepts foreign workers with Canadian credentials, this is a logical and useful series of tools.

When the global recession began over a year ago, Canada responded by tightening up the issuance of some kinds of work permits. Notably, the proof that was required by Service Canada that an employer had recruited in the Canadian Labour Market before looking to hire a foreign worker – was dramatically increased. Many employers have been frustrated by both the need to recruit locally for positions they know they cannot fill locally, and the need to make their recruitment efforts comply with the requirements of Service Canada in this regard.

These increased recruitment requirements remain in place at this time, but certain "exceptions" to the requirements have been carved out. Interestingly, the Post Graduate Work Permit Program continues to be on Service Canada's radar as deserving of special treatment. One of the areas of "relaxation" of the recruitment rules is for workers who are coming to the end of their post graduate work permit, but who an employer would like to hire permanently. Where a "permanent job offer" is made to the foreign worker, Service Canada will provide a Labour Market Opinion without the need to prove that the employer tried to recruit a Canadian. This LMO will allow the foreign worker to work for the employer and apply for and obtain permanent residence in Canada. This rule applies in all provinces and is the final step in Canada's welcome package for foreign students.

Victoria Cowling
Tel: (416) 367-6136
Fax: (416) 361-2760
vcowling@blganada.com

[1] A Labour Market Opinion (LMO) is an opinion given by Service Canada to Citizenship and Immigration Canada which states that Service Canada, having studied the labour market, is of the opinion that the hiring of a foreign worker in a specific context would have a positive or neutral effect on the Canadian Labour Market and that a work permit can therefore be issued by CIC.

Labour & Employment Law Group

Calgary

Brian D. Portas	403-232-9705
Laurie M. Robson	403-232-9482
Sharon E. Borgland	403-232-9452
Duncan Marsden	403-232-9722

Montréal

Thomas M. Davis	514-954-3133
Valérie Dufour	514-954-2567
Rosaire S. Houde	514-954-2534
François Longpré	514-954-2543
Katherine Poirier	514-954-3175
Catherine Pronovost	514-954-2562
Jean-René Ranger	514-954-2548
André Royer	514-954-3124
Patrick Trent	514-954-3154
Philippe C. Vachon	514-954-3134

Ottawa

Jim Anstey	613-369-4754
Noëlle Caloren	613-787-3536
Nadia Effendi	613-787-3562
Morton G. Mitchnick	613-787-3568

Toronto

S. Margot Blight	416-367-6114
Naomi Calla	416-367-6129
Matthew L.O. Certosimo	416-367-6068
Lisa Cabel	416-367-6217
Jennifer M. Fantini	416-367-6726
Melany V. Franklin	416-367-6091
Michelle S. Henry	416-367-6626
Robert W. Kitchen	416-367-6023
Wendy Litner	416-367-6039
Jeffrey P. Mitchell	416-367-6226
Morton G. Mitchnick	416-367-6413
Brian D. Mulroney	416-367-6009
Genny Na	416-367-6032
Eric M. Roher	416-367-6004
Susan E. Sorensen	416-367-6017
Melanie A. Warner	416-367-6679
Robert W. Weir	416-367-6248
Kate A. Zavitz	416-367-6535

Vancouver

Peter Eastwood	604-640-4046
Shelley-Mae Mitchell	604-640-4160
Gabriel M. Somjen	604-640-4013
Steve M. Winder	604-640-4118
Alka Kundi	604-632-3465

Immigration Group

Calgary

Brian D. Portas	403-232-9705

Montréal

Darren McGuire	514-954-3105
Katherine Poirier	514-954-3175

Ottawa

Mandy Moore	613-787-3500

Toronto

Victoria Cowling	416-367-6136
Brian Dingle	416-367-6189

Vancouver

Jeffrey Thomas	604-640-4203

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Calgary
1000 Canterra Tower
400 Third Avenue S.W.
Calgary, Alberta, Canada T2P 4H2
tel.: (403) 232-9500 fax: (403) 266-1395

Montréal
1000 de La Gauchetière Street West
Suite 900, Montréal, Québec, Canada H3B 5H4
tel.: (514) 879-1212 fax: (514) 954-1905

Ottawa
World Exchange Plaza
100 Queen St., Suite 1100
Ottawa, Ontario, Canada K1P 1J9
tel: (613) 237-5160 1-800-661-4237
legal fax: (613) 230-8842 IP fax: (613) 787-3558

Toronto
Scotia Plaza, 40 King Street West
Toronto, Ontario, Canada M5H 3Y4
tel.: (416) 367-6000 fax: (416) 367-6749

Vancouver
1200 Waterfront Centre
200 Burrard Street, P.O. Box 48600
Vancouver, B.C., Canada V7X 1T2
tel.: (604) 687-5744 fax: (604) 687-1415

Waterloo Region
Waterloo City Centre
100 Regina Street South, Suite 220
Waterloo, Ontario, Canada N2J 4P9
tel: (519) 579-5600 fax: (519) 579-2725
IP fax: (519) 741-9149

www.blgcanada.com

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