

# THE EMPLOYERS' CHOICE

Summer 2003

**CRAWFORD  
CHONDON &  
ANDREE LLP**  
Management Labour &  
Employment Lawyers

2 County Court Blvd., Suite 430  
Brampton, Ontario L6W 3W8  
Phone: 905-874-9343  
Fax: 905-874-1384  
info@ccaemployerlaw.com  
www.ccaemployerlaw.com

## THE LEGAL EFFECT OF "SARS" ON THE WORKPLACE

The recent outbreak of Severe Acute Respiratory Syndrome ("SARS") may have subsided, but the legal questions it raised remain with us today. In particular, the outbreak has left many employers and employees wondering about their rights and obligations. While we hope that the SARS outbreak was a unique situation, the following is a brief outline of many of the issues that workplace parties should nonetheless keep in mind for the future.

**Nature and Symptoms:** SARS is a severe form of pneumonia that is accompanied by a fever. Other symptoms of SARS include muscle aches, headaches, and a sore throat.

**Occupational Health and Safety:** Pursuant to the *Occupational Health and Safety Act* ("OHSA"), employers are obligated to ensure the safety of employees in the workplace. This obligation likely includes "taking every precaution reasonable" to protect employees from contracting SARS in the workplace. This duty may require employers to take a number of measures, including:

1. Encouraging employees to wash their hands frequently and to cover their noses and mouths when coughing or sneezing;
2. Providing bottles of anti-bacterial soap;
3. Providing gloves or masks;
4. Providing seminars on the nature, symptoms and precautions related to SARS;
5. Restricting travel to high-risk areas;
6. Restricting workplace visits by non-employees; and
7. Prohibiting employees displaying symptoms from attending at the workplace. Such employees should be encouraged to enter quarantine and to seek medical treatment.

While quarantined employees who are not entitled to sick leave or short-term disability benefits may not be entitled to a paid leave of absence, employers may wish to consider granting such paid leave so as to encourage employees to observe their quarantine. This cost is certainly lower than the cost of closing the entire business for ten days should a symptomatic employee attend at work and expose the entire workforce to potential infection.

Difficulties will undoubtedly arise in respect of matters such as obtaining suitable evidence of exposure to justify a request for a leave of absence or identifying symptoms related to SARS versus other, less serious, health risks.

Should an employer face a work refusal from an employee concerned about his or her health due to potential exposure to SARS via a co-worker, the employer should follow the normal work refusal procedure as set out in the *OHSA*.

**Workplace Safety and Insurance:** The *Workplace Safety and Insurance Act, 1997* ("WSIA") provides for compensation for "personal injury arising out of and in the course of employment", and where "a worker suffers from and is impaired by an occupational disease that occurs due to the nature of one or more employments in which the worker was engaged."

### ALSO IN THIS ISSUE

*Poor Treatment is Constructive Dismissal*  
.....Page 3

*Privacy Legislation: Additional Regulation of  
Surveillance in the Workplace*  
.....Page 3

According to the Workplace Safety and Insurance Board (the "Board"), workers with symptoms of SARS who were infected in the course of their employment may be entitled to the usual benefits and services available under the *WSIA*, decided on a case-by-case basis. However, the Board advises that the *WSIA* does not provide coverage for workers who are symptom free, even when quarantined or sent home on a precautionary basis.

**Human Rights Code and Privacy Issues:**

Employers must ensure they do not discriminate against or allow the harassment of employees on the grounds enumerated in the *Ontario Human Rights Code* (the "Code") (i.e. race, place of origin, handicap), and are reminded that both actual and perceived handicaps (i.e. exposure to SARS) are covered by the *Code*. In particular, employers must not discriminate against employees because they, or members of their family, may have contracted SARS, or may have visited or come from, countries suffering from SARS outbreaks. In addition, an employer's obligation to accommodate any actual or perceived disability will also arise (i.e. leave of absence, work from home). Finally, employers must ensure they do not breach an employee's legitimate expectation of privacy with respect to the handling of personal health information.

**SARS Leave:** This past spring, the Ontario government enacted the *SARS Assistance and Recovery Strategy Act, 2003* ("SARS Act"). The *SARS Act* creates a new category of unpaid leave and reinstatement rights for employees affected by the SARS outbreak. The SARS Emergency Leave is in addition to an employee's current Emergency Leave entitlement under the *Employment Standards Act, 2000* ("ESA 2000"), and was made retroactive to March 26, 2003. Key elements of the *SARS Act* include:

1. SARS Emergency Leave applies to employees who are or were unable to work for SARS-related reasons;
2. Unlike Emergency Leave, SARS Emergency Leave applies to all employees. It is not restricted to employers regularly employing 50 or more employees;
3. If Emergency Leave was taken before the passage of the *SARS Act*, that leave will be deemed to have been SARS Emergency Leave (if the above qualifications are met),

and any Emergency Leave entitlement used in this regard will have to be restored.

4. The *SARS Act* does not limit the number of SARS Emergency Leave days; and
5. Employers who penalize employees for taking SARS Emergency Leave may themselves be penalized.

**Employment Insurance:** The federal government amended regulations under the *Employment Insurance Act* in order to remove the ordinary two-week waiting period for individuals who qualify for sickness benefits in SARS-related cases. In addition, individuals under quarantine by order or recommendation of a public health official, or by request of their employers or specified health care providers, will not be required to provide a medical certificate.

**Lessons Learned:** SARS raised a number of serious health concerns that our health care providers and policy makers had to respond to in a timely manner. The outbreak also raised many workplace concerns and legal issues for employers and employees alike. It is important to be aware of such issues should SARS or another similar outbreak, arise in the future. However, in addition to being aware, employers are advised to plan in advance, as much as is possible, their responses to such outbreaks. An effective method of planning such responses is to implement appropriate workplace policies. In such policies, employers could establish contingency plans for responding to these outbreaks, including such items as:

1. Detailing the duties of the workplace official who is responsible for coordinating the company's response to such outbreaks;
2. Outlining the nature of medical information that an employer would require in order to excuse employees from attendance at work, including consent forms for the employer's use of such information;
3. Outlining strategies to contain the spread of infections, including policies on appropriate workplace hygiene; and
4. Discussing when paid leave may or may not be granted.

These are only a few of the items that employers may include in comprehensive workplace policies pertaining to outbreaks of illnesses such as SARS. If employers wish to implement such policies in

their own workplaces, we would encourage them to seek labour and employment law advice.

## **POOR TREATMENT IS CONSTRUCTIVE DISMISSAL**

The recent decision of the Ontario Superior Court of Justice in *Saunders v. Chateau Des Charmes Wines Ltd.*, [2002] O.J. No. 3990 held that a senior manager who had been subjected to derogatory and demeaning conduct at the hands of the owner of his employer had been constructively dismissed. This case follows the earlier decision of the Ontario Court of Appeal in *Shah v. Xerox Canada Ltd.*, [2000] O.J. No. 849 which held that constructive dismissal does not necessarily require a particular breach of a fundamental term of the employment contract, but can be found where the circumstances establish that the employer has, without cause, repudiated the entire relationship by its conduct. A situation which can be characterized as having an atmosphere of hostility, embarrassment or humiliation has been held to amount to one which permits an employee to resign and seek damages for constructive dismissal. The Court in *Saunders* relied on the following as examples of conduct which was unacceptable:

- Hostile, aggressive, profane, rude, demeaning, abusive and intimidating conduct directed toward the employee;
- A management style occasionally punctuated with anger and profanities; and
- Discipline carried out in a manner which is demeaning.

The Court confirmed that employees are entitled to be treated with civility, decency, respect and dignity, particularly in the context of discipline. The test appears to be whether the treatment of the employee by the employer was of sufficient severity and effect to constitute a repudiation of the employment relationship.

Another important finding of the Court was that otherwise inadequate performance can become exempt from discipline due to the negative effect the manager's conduct has on the employee's ability to concentrate and, thereby, improve his/her performance. In such a case, the discipline may be the cause of the poor performance rather than

the result. In this case, the Trial Judge also found that the employee had no obligation to advise the owner that the conduct was unacceptable. It clearly stated the onus is not on the "vulnerable employee" to confront the owner about his behaviour. Rather, the Court placed the onus on the employer to identify the problems in the workplace and take appropriate steps.

While placing the onus on employers to identify mistreatment of employees may be an acceptable position in the context of objectively inappropriate and overly severe conduct, in less obvious cases it takes away any responsibility from the employee to indicate to the employer that the management style is having a demotivating or debilitating result. When coupled with the possible inability to discipline the employee for poor performance due to the effect of the discipline on the employee's concentration, this approach will make it extremely difficult for managers to effectively follow the principles of progressive discipline. It will also hamper their ability to identify which employees react to which kinds of motivation and to apply different types of motivation to different employees, an approach advocated by many management and leadership programs.

In the end, Mr. Saunders, a 39-year-old sales manager with almost 10 years service was awarded 12 months pay in lieu of notice. The Court went on to award an additional 3 months remuneration in lieu of notice based upon the bad faith conduct to which the employee was subjected. It found personal attacks using extremely antagonistic methods of expressing disagreement caused a significant amount of stress for the employee, including embarrassment and humiliation in front of his colleagues, and constituted "unfair dealing".

## **PRIVACY LEGISLATION: ADDITIONAL REGULATION OF SURVEILLANCE IN THE WORKPLACE**

The Privacy Commissioner of Canada (the "Commissioner") recently found in favour of a railway employee's complaint that his employer had contravened the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") by improperly collecting personal

information through video surveillance. In this case (*PIPEDA* Case Summary #114), the employer had installed digital video recording cameras in the company yard to reduce vandalism and theft, liability for property damage, and threats to staff safety. The employer informed employees of the existence of the cameras and their purpose, and provided details about camera locations. Employees were told that the cameras were trained on areas of access and were positioned away from employee work areas. While the Commissioner acknowledged that the company's stated purpose appeared appropriate, he determined that the proper application of *PIPEDA* required considering the circumstances of each situation and certain questions including:

- Is the measure demonstrably necessary to meet a specific need?
- Is it likely to be effective in meeting that need?
- Is the loss of privacy proportional to the benefit gained?
- Is there a less privacy-invasive way of achieving the same end?

In considering the above questions the Commissioner ultimately decided that, given the relatively minor incidents of vandalism that the company had encountered, the employer failed to demonstrate the existence of a "real, specific problem, only the potential for one." He concluded also that while the cameras were not pointed towards work areas, it might be possible to identify an individual during the day and that the mere presence of the cameras could give rise to the perception among employees of an invasion of privacy. The Commissioner also concluded that there were less privacy-invasive measures available to the employer to address employee security issues, such as installing better lighting in the parking lots.

On the facts of this case, the employer likely would have had little difficulty establishing that the surveillance was reasonable under the analysis typically applied by arbitrators resolving employee grievances in the arbitral context. Now, in addition to traditional workplace privacy considerations in the arbitral context, the application of *PIPEDA*

adds the consideration of whether the imposition of video cameras constitutes an improper collection of personal information. *PIPEDA* also requires employers to ensure that they have obtained the consent of individuals who could be video recorded (unless the workplace investigation exemption applies); that individuals are notified and given details about the videotaping, including the purposes for the collection of the information; and that employees are allowed, upon request, to view the videotaped recordings of themselves.

This decision provides an instructive example of how the application of *PIPEDA* imposes additional obligations on employers as well as additional considerations to established arbitral principles that have addressed traditional privacy issues that arise in such circumstances as video surveillance in the workplace. *PIPEDA* currently applies to federally regulated employers vis-à-vis their handling of the personal information of employees. Effective January 1, 2004, *PIPEDA* will apply to all organizations that handle personal information in the course of commercial activities, unless the organization is provincially regulated and operates in a province that has enacted legislation that has been deemed "substantially similar" to *PIPEDA*. Ontario has yet to enact substantially similar legislation, and it is unlikely that the province will enact such legislation by January 1, 2004. However, it is anticipated that Ontario will enact private sector privacy legislation in the near future that will regulate the handling of employee personal information in a manner similar to *PIPEDA*.

***We welcome two new "additions"  
to our firm:***

***Christopher Andree's son, Matthew;***

***and***

***Susan Crawford and David  
Chondon's son, Samuel***

***Please Note:*** This newsletter is prepared as an informational service for our clients and other interested parties. It is not intended to constitute legal advice, a complete statement of the law or an opinion on any subject. Although we endeavour to ensure the accuracy of the content, no one should act upon the information provided without a thorough examination of the law after the facts of a specific situation are fully considered.