

THE EMPLOYERS' CHOICE

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EMPLOYMENT STANDARDS ACT, 2000 IN EFFECT

With little notice and even less fanfare the *Employment Standards Act, 2000* (the "Act") was proclaimed into force on September 4, 2001. For a summary of the significant changes, please review our December 2000 issue of *The Employers' Choice* or visit our website (www.ccaemployerlaw.com) for a copy.

Additional changes were made to the Act prior to its proclamation. Those changes included:

- Each pay statement shall indicate the pay period, wage rate, gross wages, and accrued vacation pay for current and previous years (unless paid in each pay period)
- The parties may agree to a payment of accrued vacation pay at any time
- An employee must begin her pregnancy leave no later than the earlier of her due date and the date of birth
- Employees' right to vacation time will not be negatively affected by the exercise of their right to emergency leave
- Officers of a corporate employer are deemed to be employees
- A complaint may not be filed more than 2 years after the alleged contravention.

The much-anticipated revised Regulations were also proclaimed into force on September 4, 2001. The following are some of the highlights.

Information Technology Professionals

A definition of an "information technology professional" has been added to the Regulations. These individuals are exempt from the hours of work and overtime provisions.

Other Exemptions from the Act

Various healthcare and other professionals are exempt from the emergency leave provisions if the exercise of their entitlement would constitute an act of professional misconduct or dereliction of their professional duty.

The exemption from hours of work, eating periods and overtime pay with respect to supervisors and managers has been clarified to limit the exemption to an employee whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis.

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Retail Workers

Retail workers may be required to work on Sundays provided it was a term and a condition of their hiring. However, such an obligation cannot be made a term and condition of hiring if it would be contrary to the Ontario Human Rights Code. Further, an employer cannot refuse to hire someone who refuses to work Sundays for religious reasons or who, subsequent to hiring, refuses to work on Sundays because of religious belief or religious observance.

Automobile Salespeople

Specific provisions have been included for commissioned automobile salespeople. The provisions apply to a salesperson who is paid partially or exclusively on a commission basis and requires payment of the minimum wage, a pay period of not more than one month, and a reconciliation of wages paid with commissions earned at least quarterly.

Director Approval

The Director may approve an agreement between an employer and an employee to average hours of work for overtime pay purposes over a period of more than four weeks.

The Director may approve an agreement to work more than 60 hours in one week with respect to an employer or a class of employers. An employee's agreement to work more than 8 hours in one day will be irrevocable if the agreement is made at the time of hiring and is approved by the Director.

Penalties

Penalties for first, second and subsequent contraventions of the Act have been fixed at \$250.00, \$500.00 and \$1000.00 per contravention. Where a contravention affects more than one employee, the penalties are multiplied by the number of employees affected by the contravention. This can result in

significant liability for even "technical" breaches of the Act.

Other changes

- Notice of termination can now delivered by fax or electronic mail.
- Provisions previously included in the *Industrial Standards Act* have been incorporated into the *Employment Standards Act, 2000* and its Regulations.
- The material to be posted pursuant to the Act is a poster entitled "What You Should Know About the Ontario Employment Standards Act".

As we have stressed previously, employers should take the time to review their policies and practices to ensure they are consistent with the new *Employment Standards Act, 2000* and its Regulations. In light of the publication of the Act well prior to its effective date, it is anticipated that an employer who fails to act quickly to ensure compliance will not be shown much leniency. The consequences of a failure to comply have been made more severe and may be non-discretionary.

SUPREME COURT CLARIFIES WHETHER DISHONESTY EQUALS CAUSE

The Supreme Court of Canada recently released a decision that answers two questions of interest to non-unionized employers:

1. When will dishonest conduct by an employee justify termination for just cause?
2. How is the notice period affected where an employer has breached its duty of good faith and fair dealing?

Mr. McKinlay worked as a Controller for BC Tel for 17 years. His employment was terminated at age 48 while he was on a leave of absence for

medical reasons. Mr. McKinlay alleged that BC Tel refused to provide suitable alternative work, his termination was without just cause, and BC Tel had breached its duty of good faith and fair dealing in the manner of his termination. BC Tel argued that Mr. McKinlay was aware of alternative treatment methods which would allow him to return to his old job and when Mr. McKinlay advised his supervisor that his physician had recommended a new job as the only suitable treatment, Mr. McKinlay had deliberately lied. Accordingly, BC Tel argued it had just cause to terminate Mr. McKinlay's employment.

Mr. McKinlay was successful at trial and a jury awarded him 22 months' notice, plus an additional 4 months' notice due to BC Tel's breach of its duty of good faith and fair dealing. The British Columbia Court of Appeal overturned the jury's award on the basis that Mr. McKinlay had been dishonest with his employer and, therefore, could be summarily dismissed for just cause, irrespective of the severity or degree of dishonesty. Mr. McKinlay appealed to the Supreme Court of Canada which overturned the appeal decision and found that BC Tel did not have just cause to terminate Mr. McKinlay's employment. The jury's award was reinstated.

The Supreme Court of Canada concluded that an employer must examine the act of dishonesty in the context of the employee's overall employment in order to determine whether such dishonesty amounts to just cause. It found that an absolute, unqualified rule that a single act of dishonesty entitles an employer to dismiss an employee for just cause could result in dismissals which are both unreasonable and unjust. The Court favoured an approach which "examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship".

The second reason this case is important to employers is because of the Court's acceptance of the jury's award. An award of 26 months' notice to a middle manager is beyond the

generally recognized maximum period of notice which even the most senior employee would receive.

The additional four months' notice awarded to Mr. McKinlay was based on the application of the 1997 *Wallace* decision of the Supreme Court of Canada which held that the notice period can be increased where the employer has breached its duty of good faith and fair dealing in respect of the manner of the termination of employment. Many decisions which applied the "Wallace factor" adopted a two-step analysis. The first was to determine the "reasonable notice" to which the employee was entitled based upon the generally accepted factors which include age, length of service, position within the organization and the chances of finding similar suitable alternative employment. The courts would then "bump up" the notice by an indeterminate amount to compensate the employee for the breach of the employer's duty of good faith and fair dealing. However, the Ontario Court of Appeal in *Noseworthy v. Riverside Pontiac-Buick Ltd.* specifically rejected this approach. It mandated that courts consider the "Wallace factor" along with all of the usual factors to determine where, within the generally accepted range, the notice for any particular employee would fall. While accepting that the top end of the range was "elastic", the Court made it clear that the approach of applying a "bump up" was unacceptable, at least in Ontario.

Of significance, the Supreme Court of Canada in this case specifically refers to an "extended notice award" and endorses the jury's award of the extension of the notice period "by an additional 4 months to represent the damage caused by these exacerbating factors".

This recent decision serves to remind employers that there are few circumstances where they can feel comfortable in summarily dismissing an employee for dishonesty without examining all the circumstances, including the employee's length of service and previous incidents of dishonesty. Further, should an employer fail to fulfill its obligation of good faith and fair dealing in respect of the termination, the consequences can be costly.

DUTY OF GOOD FAITH DURING EMPLOYMENT?

In a June 2001 decision, the British Columbia Supreme Court took a step towards recognizing a contractual duty on employers to treat their employees fairly during the course of their employment.

Mr. Marlowe worked as a sales representative for Ashland Canada from 1994 until he was fired in 1998. Mr. Marlowe always exceeded his individual sales goals. In fact over the course of his employment he increased sales in his region by 500%. Mr. Marlowe also met the minimum requirements in all other areas of his employment. Overall, the Court found that Mr. Marlowe was an "extremely productive salesman for the company".

Notwithstanding Mr. Marlowe's positive performance, his new supervisor gave him a poor performance review approximately three months before he was terminated. The review contained allegations of misconduct that were found to be exaggerated and unsupported. Mr. Marlowe was given the lowest possible rating even though the Court found that there was "no basis" for it. The Court found that if Mr. Marlowe had been fairly assessed he would have received a mid to high rating. The only conclusion that the Court could reach was that the supervisor gave the undeserved review to deprive Mr. Marlowe of a bonus for the current fiscal year.

The review had other consequences. Ashland's management used it to recommend Mr. Marlowe's dismissal in December 1998. Ashland also discussed the review's contents with a prospective employer after Mr. Marlowe's termination. The prospective employer decided not to hire Mr. Marlowe.

The Court found that the supervisor's actions and the content of the review were "harsh, vindictive, malicious and reprehensible". The supervisor's conduct was "offensive and reprehensible", and a "substantial departure from the conduct and practices reasonably to be expected of an employer" such as Ashland.

The Court awarded Mr. Marlowe wrongful dismissal damages equivalent to four and one-half months of his salary, or almost \$19,000.00. The Court also awarded an additional \$20,000.00 for punitive damages. The Court held that employers were "bound to deal with matters of employment fairly and in good faith" and that the unsubstantiated review violated this principle. Ashland had to "be reminded by means of a financial penalty of its obligation to deal with employees in good faith".

This decision is open to criticism. The Supreme Court of Canada in *Wallace* rejected any independent duty of good faith towards employees other than an employer's duty to terminate employees in a fair manner. The B.C. Supreme Court's decision arguably extends the law beyond the Supreme Court of Canada's restrictions. As such, it may be overturned on appeal. However, employers should take note of this decision which may signal a trend toward extending an employer's duties to its employees. The case also reminds employers that there may be severe and unexpected consequences where they fail to ensure that all employee performance reviews are done fairly and truthfully, and that negative aspects are supported by verifiable facts.

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

***Jayson A. Rider, Partner;
Justin K. Diggie, Associate;
Janice MacDougall, Assistant;
Laura Williams' baby, Kaya.***