CRAWFORD CHONDON & ANDREE LLP

Management Labour & Employment Lawyers

2 County Court Blvd.
Suite 430
Brampton, ON
L6W 3W8

Tel: (905) 874-9343
Fax: (905) 874-1384
Toll Free:
1-877-874-9343

www.ccaemployerlaw.com

IN THIS ISSUE

The Employers' Edge

SPRING 2004

Who is the "Employer" of Agency Workers?

A recent decision of the Ontario Labour Relations Board (the "Board") reaffirms the challenges faced by companies and agencies supplying contract personnel in establishing who is the true employer.

Lantic Sugar Limited was a certification application in which the Teamsters had applied to represent employees at Lantic Sugar Limited. Advantage Personnel was an intervenor in the application. Both Lantic and Advantage took the position that the individuals sought to be certified by the Teamsters were employees of Advantage. The Board held a hearing to determine the true employer for the purposes of the *Labour Relations Act, 1995* (the "*Act*").

Advantage Personnel provides temporary and long-term trained personnel to clients. Specifically, Advantage provided Lantic with drivers who operated bulk trailers, liquid tanker trucks and vans and delivered product to Lantic's customers. Lantic had been a client of Advantage for a number of years.

In determining which of Lantic or Advantage was the employer for the purposes of the *Act*, the Board undertook a thorough review of the particular facts of the relationship, and then analysed the facts against a series of established criteria, including:

1. The party exercising direction and control over the employees performing the work;
2. The party bearing the burden of remuneration;
3. The party imposing the discipline;
4. The party hiring the employees;
5. The party with the authority to dismiss the employees;
6. The party who is perceived to be the employer by the employees; and
7. The existence of an intention to create the relationship of employer and employees.

Based on these criteria, the Board acknowledged the difficulty of the decision and stated there were factors that pointed to both Lantic and Advantage as the employer. However, the Board ultimately held that for the purposes of the *Act*, Lantic was the employer as it exercised fundamental control over the employees. Specifically, at paragraph 84, the Board stated:

"...While it is true that Advantage is more than a mere paymaster, in relation to these drivers, it is my conclusion that, in the final analysis, Lantic has more say in their day-to-day working lives than Advantage. Lantic schedules such individuals on a daily basis, and sets the practices and procedures to be followed. Although it does not hire directly, such individuals must pass a probationary period with Lantic and must satisfy Lantic as to their performance. By the terms of the commercial contract between Advantage

continued on page 2

Who is the "Employer" of Agency Workers?

continued from page 1

and Lantic, Lantic retains the right to discipline such individuals or to have them removed from the account. When all the evidence is considered, I have concluded that it is Lantic which exercises fundamental control over such drivers for the purposes of the Act. As such, it should be the entity with which the union bargains for in relation to the terms and conditions of employment. I therefore find that for purposes of the Act, Lantic is the employer of the drivers in issue. "

Though the Board will consider a variety of factors and weigh them according to their particular relevance in the case, in the final analysis the determination of who is the employer for the purposes of the *Act* will hinge on which company has *fundamental control* over the employees in question. Quoting from a previous decision, the Board noted at paragraph 83 of *Lantic Sugar Limited*, "…to find the seat of fundamental control is generally to find the employer for the purposes of the *Labour Relations Act*."

If, like Advantage, you are in the business of supplying contract personnel to outside organizations, the Board's decision will no-doubt have you wondering what practical implications there could be for you and your organization. Similarly, companies who utilize the services of agencies providing contract personnel should assess their potential liabilities as the true employer.

In the typical course of events, a union will apply to certify a group of employees working for a particular employer. An agency providing contract personnel is likely to be named as being the responding employer by the union seeking certification. Rather, depending on the intended relationship with the company, the agency may intervene in the application by virtue of being an "affected" party and assert that it is the true employer of the employees the union seeks to represent.

Depending on the contractual intentions of the company and agency provider, who is held to be the true employer for the purposes of the *Act* can have far-reaching practical and financial consequences. If there is a dispute as to who the true employer is, the Board will hold a hearing to make a determination. If the Board determines that the agency is not the employer for the purposes of the Act, then the company will be certified provided the union has the necessary support of the employees. Further, the company will be required to bargain terms and conditions of employment with the union and, therefore, the ongoing role for the agency may be in some doubt.

While each certification application is decided on its own unique facts, the Board will always undertake a review of the facts with a view to determining which organization exercises fundamental control over the employees in question. Therefore, as noted in *Lantic Sugar Limited*, the party with the authority to discipline/discharge employees, assess suitability during the probationary period, set daily work schedules and determine practices and procedures to be followed will likely be found to be the true employer for purposes of the *Act*.

Agencies providing contract personnel and companies utilizing these services are encouraged to "audit" their relationship (and hence their respective roles relative to the employees) based on the criteria set out by the Board. This will provide an opportunity to assess whether or not the parties' intention as to "who is the employer" (and associated liabilities) is reflected in practice.

While this article is unable to provide specific advice to your organization, please contact any of the lawyers at Crawford, Chondon & Andree LLP should you have any concerns.

We are pleased to announce...

that effective February 2004 Karen L. Fields has joined the partnership of Crawford Chondon & Andree LLP. Karen has over 12 years of experience representing employers in all areas of labour and employment law including wrongful dismissal actions, pay equity, federal employment equity, Human Rights complaints and Employment Standards matters. Karen has particular expertise defending companies and supervisors that have been charged under the *Occupational Health and Safety Act*, and regularly provides advice, opinions and training on a full range of Occupational Health and Safety issues, including supervisors' obligations and due diligence.

Upcoming Events

June 2004

1st **Christopher Andree**
Temporary Agencies and Obligations of the Employer
Six-Minute Employment Lawyer, Toronto

10th **All CCA Lawyers**
Management Labour and Employment Law Forum
The Pearson Centre
Brampton, Ontario
(see newsletter insert)

August 2004

16th **Laura Williams**
Impact of Canada's New Privacy Legislation
IFEBP Canadian Conference
Sheraton Centre, Toronto

If you wish to attend any of these events, please visit our website for further details.

Ontario Proposes Health Care Sector Privacy Act

On December 17, 2003, the Ontario Government introduced privacy legislation that, once enacted, will apply specifically to health care sector organizations. This legislation, named the *Personal Health Information Protection Act, 2003* ("*PHIPA*"), will impose a comprehensive set of rules to regulate the handling of personal health information by "health information custodians", which include health care practitioners, hospitals, long-term care facilities, pharmacies, laboratories, ambulance services and social workers.

Under *PHIPA*, "personal health information" includes information relating to the physical or mental heath, health care, health number and health care provider, among other things.

PHIPA is expected to be enacted during the current spring legislative session. Accordingly, health sector organizations should begin to undertake a review of their policies and practices regarding the collection, use and disclosure of personal health information in their custody and/or control.

In the next issue of our newsletter we will provide a full overview of PHIPA including a review of the impact that this legislation could have on employers' handling of employee medical information when managing attendance and accommodation issues.

Unfair Labour Practice Leads to Order of Binding Arbitration

In a recent decision, the Canada Industrial Relations Board ordered TELUS Communications Inc., an employer which it found guilty of committing unfair labour practices during collective agreement negotiations, to offer the Telecommunications Workers Union binding arbitration to resolve any outstanding items necessary to settle a collective agreement. It is this remedy that makes the TELUS decision so noteworthy for employers. The decision effectively imposes a termination of negotiations and requires the offer of binding private arbitration; a remedy that is not explicitly authorized by the *Canada Labour Code*. This remedy is more severe than the remedy imposed in Royal Oak Mines, a 1993 decision that flowed from the most acrimonious collective bargaining process the country has ever witnessed. Crawford Chondon & Andree LLP will continue to monitor the status of the TELUS decision and will provide a more comprehensive analysis in the future.

References: A Double Edged Sword?

In our last newsletter we explored the legal issues surrounding reference checks. In this second part of our continuing series we review some legal implications surrounding giving references and reference letters. It is hoped that both of these articles will assist employers in maximizing the benefits and minimizing the risks associated with references.

Part 2: Why Give References?

Many employers in Canada have adopted a policy of refusing to provide "subjective" references for former employees. Instead, these employers have adopted a "letter of employment" only policy. This means that the reference letter will be confined to discussing dates of employment, position and duties performed and that no statement concerning the employee's attributes, either positive or negative, will be made. The courts have referred to these letters as "perfunctory."

The natural result of employers adopting a no "subjective" reference policy is that employees who are poor performers, who have engaged in serious misconduct or who have serious attitude problems may be able to bounce from employer to employer in successive periods of employment. Thus, the collective refusal by employers to provide employment references can ultimately damage the quality of the workforce for all employers.

Additionally, an employer who refuses to provide a reference or merely provides a perfunctory letter of employment to a dismissed employee runs the risk of frustrating the ex-employee's job search, thereby aggravating or extending the notice period in the ex-employee's claim for damages in a wrongful dismissal action.

The reason most often cited by employers for refusing to provide employee references is the fear of being sued for defamation or some similar tort if a negative reference is provided. They rely on mother's old adage, "if you have nothing good to say, then don't say anything at all."

In fact, however, employers who provide an honest, albeit negative, reference are protected from defamation suits by two defences: justification and qualified privilege.

Employers who provide an honest, albeit negative, reference are protected from defamation suits by two defences: justification and qualified privilege

Justification (truthfulness) is a complete defence to an action for defamation. A true statement cannot, by definition, be defamatory. The doctrine of qualified privilege, on the other hand, provides that where a person making a statement has an interest or a duty (legal, social or moral) to make it to the person to whom it is made and the person to whom it is made has a corresponding interest in receiving it, then the communication will be privileged and protected from action for defamation unless the statement is intentionally malicious.

As it relates to a reference, a former employer arguably has a moral or social obligation to advise a prospective employer about problems it had with an ex-employee and the prospective employer arguably has a moral or social (and, readers of Part 1 of this series will remember, possibly even a legal) obligation to carefully screen candidates for employment.

In two cases employers were sued for allegedly defamatory statements made to third parties following an employee's summary resignation and dismissal for cause respectively. In both cases the Court found that the defences of justification and/or qualified privilege protected the employers' statements that were at issue. In two other cases courts in Canada found, alternatively, that statements made in a termination letter and in conversations with Employment Insurance officials with respect to the reasons for the employee's dismissal, were protected either by justification or qualified privilege, and that statements made by a representative of a former employer to prospective employers in order to discourage them from hiring a former employee were also subject to a qualified privilege.

Based on the law as it currently stands, it appears that there is little legal risk to employers who provide truthful and non-malicious references regarding former employees. The risks of being successfully sued for providing an honest, albeit negative, reference are minimal and are generally outweighed by the broader costs and risks associated with a widespread practice of not sharing honest evaluations or references for ex-employees. In light of the above, employers may wish to reconsider their existing reference policies and look at providing more detailed references.

Human Resources Solutions, Systems & Training

THE EMPLOYERS' CHOICE INC.

www.theemployerschoice.com

Assessing Training Needs? Keep it Simple

Simply stated, training is an activity that companies should approach with the goal to maximize the return on investment. Too often, valuable training dollars are wasted. In order to avoid wasting the investment in training, an annual assessment of training needs can be quite effective.

A needs assessment does not have to be complicated. Some of the questions you should ask yourself include:

What is the Purpose of Training?

To begin, you must first define the purpose of training initiatives. For example, are you interested in providing training to help current employees take on more complex work or do you just want them to focus on mastery of the tasks in their present jobs? Your approach will affect the type of training to be delivered, the process by which employees are selected to receive training, and how the training results will be evaluated.

Make sure you have removed any obstacles before you invest in training

Will "Training" Solve Your Problem?

Be sure you have a clear understanding of organizational and individual job requirements. You should pair your organizational goals with your organizational and individual skill gaps. Having up-to-date job analysis and individual performance information is critical.

Once the data has been analyzed, it is important to take an additional step and determine if the investment in training will address the gaps.

Are Your Employees Supportive of Being "Trained"?

Some employees are resistant to training. They may view training as "reprogramming", or may have such a heavy workload that they cannot find the time for training, or they may feel the training offered is irrelevant. Make sure you have removed any obstacles before you invest in training. Employee surveys are an effective method of gathering this information.

The Right Training Method

Once you understand the organizational environment and training requirements, you can find the most appropriate method for training. There are many options available including in-house sessions, e-learning, professional development programs and skills-specific training. There are also many community resources that are useful and cost-effective.

By performing the assessment annually, you can equip the Company with a training priorities list. This enables you to stay focused on the programs which will help the Company achieve its goals.

New Member of The Employers' Choice Team

We are pleased to announce that we have entered into a strategic partnership with Judy Dulovic, CHRP. Judy comes to TEC with many years of experience in the health and safety and WSIB arena, and assists clients with health and safety training, Workwell Audits, and WSIB claims management issues. Judy can be reached at (905) 874-1035 ext. 250.

Planning To Dismiss An Employee?

Consider our Career Transition Services Package. We have partnered with Graham Management Group to provide our clients with an exclusive high-quality, cost-effective career transition package. For further information call us at (905) 874-1035 ext. 430.

Upcoming Workshops and Events

May 6th **Bonni Titgemeyer**
U.S. Employment Practices, Human Resources Professionals of York Region

June 10th **Management Labour and Employment Law Forum**

August 16th **Bonni Titgemeyer**
Employee Relations Best Practices, IFEBP Canadian Conference

Bonni Titgemeyer is the Managing Director of The Employers' Choice Inc. which is a full-service human resources management company providing solutions, systems and training in a broad range of human resources areas.

Our Lawyers

DAVID M. CHONDON
dchondon@ccaemployerlaw.com

KAREN L. FIELDS
kfields@ccaemployerlaw.com

SUSAN L. CRAWFORD
crawford@ccaemployerlaw.com

CHRISTOPHER M. ANDREE
candree@ccaemployerlaw.com

JAYSON A. RIDER
jrider@ccaemployerlaw.com

LAURA K. WILLIAMS
lwilliams@ccaemployerlaw.com

JUSTIN K. DIGGLE
jdiggle@ccaemployerlaw.com

ALLISON SMITH
asmith@ccaemployerlaw.com

"The Employers' Choice"

www.ccaemployerlaw.com

Minimize Risk and Liability with Written Employment Agreements

A recent Ontario Court decision illustrates why every Ontario employer should use written employment agreements which, among many other features, limit the rights of non-unionized employees to notice of termination without cause, or payment in lieu of such notice.

Mr. Weselan was employed by an engineering consulting company as a professional engineer and a branch office manager. He was employed for 29 years and was 58 years of age at the time of the termination of his employment without cause. He worked in a rural area and his prospects for re-employment given his experience, training and qualifications were found to be "virtually nil". Given these factors, **and absent an employment agreement,** the Court determined that he would have been entitled to 24 months notice of termination, or $151,400.00.

Fortunately for his employer, Mr. Weselan had signed a written employment agreement which was found to be enforceable. The agreement limited Mr. Weselan to 90 days pay in lieu of notice of termination, or $18,925.00. Accordingly, in light of the Court's assessment of reasonable notice of $151,400.00, the value to this employer of having a written employment agreement with Mr. Weselan was $132,475.00.

We have always advocated the use of written employment agreements for all employees. This case illustrates how an employer can benefit from their use with older, senior level, long-service employees. However, even in the case of young, entry-level short-service employees, written employment agreements provide value, and more than pay for the cost of their preparation. Written employment agreements can also be implemented for existing employees to reduce their entitlements upon termination without cause. We encourage employers to contact any of our lawyers to discuss the implementation of written employment agreements for their workforce. For those that already use agreements, we would be pleased to review them and discuss any improvements which can be made to maximize their value to your organization.

Did you know that...

Employers do not have the automatic right to:

- **A probationary period**
- **Temporarily lay off employees**
- **Suspend with or without pay**
- **Terminate for cause in cases of dishonesty, theft, violence, incompetence, conflict of interest**
- **Alter duties, responsibilities, location, title, reporting relationship**

Written employment agreements are an excellent way for employers to gain these rights and many others.