

Ultimate HR Manual

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A TERMINATION UNDER STATUTE IS A TERMINATION FOR ALL PURPOSES

— Randall Boessenkool of Stikeman Elliott LLP. © 2012 Stikeman Elliott LLP. Reproduced with permission.

In *Elsegood v. Cambridge Spring Service (2001) Ltd.*,¹ the Ontario Court of Appeal examined whether termination due to length of layoff under the *Employment Standards Act, 2000* ("ESA") also qualifies as termination at common law. Once his layoff met the definition of termination under the ESA, Mr. Elsegood successfully filed a claim for common law damages for his termination. The Court of Appeal agreed that termination under the ESA was termination for all purposes, and Mr. Elsegood was entitled to common law damages.

Mr. Elsegood was a spring technician for Cambridge Spring Service with seven years service. He was 48 years old at the time of termination. On April 4, 2009, due to the economic downturn, he was laid off, with the company continuing to pay their portion of his benefits. Mr. Elsegood was recalled on June 9, 2009, but laid off a second time on July 28, 2009, and remained on layoff from that date forward. On January 22, 2010, the cumulative period of layoff reached the statutory maximum of 35 weeks within a 52-week period, set out in section 56 of the ESA.

Upon reaching this date, Mr. Elsegood elected to proceed against his employer with a claim in small claims court for common law damages for wrongful dismissal. However, the employer argued that Mr. Elsegood's termination was only a termination for the purposes of the ESA, and thus limited Mr. Elsegood's entitlement to damages to those provided under the ESA. Deputy Judge Holub disagreed, and awarded him damages reflecting a notice period of six months, together with interest and costs.

Upon appeal to the Divisional Court, the employer argued that a termination under the ESA should limit recovery to the damages set out in the ESA. The Divisional Court dismissed the appeal in a short decision,² stating:

"I do not read the [ESA] or the case law referred to me as restricting the calculation of damages in this fashion. Rather, the [ESA] merely sets out the minimum to which an employer is exposed in the event of termination without adequate notice, and does not create a ceiling for damages in this field."

The employer appealed to the Court of Appeal, which refused to set aside the trial judge's award of common law damages based on the employee's termination by the operation of the provisions of the ESA.

The Court's Decision

The employer's appeal was based on a simple premise: the ESA and the common law are independent regimes; an employee's "actual" employment status is defined by the

common law, and the ESA operates only to entitle the employee to the remedies under the ESA. On this premise, common law damages for wrongful dismissal are only available for what would constitute a dismissal at common law and are not available for a “deemed termination” under the ESA.

Mr. Justice Juriensz, for a unanimous Court, dismissed the appeal with two different conclusions: The ESA and common law do not operate as separate regimes, and therefore a termination under the ESA is a termination for all purposes; and, even if termination under the ESA was not termination at law, an employee who was laid off for more than 35 weeks in a 52-week period would be able to claim constructive dismissal at common law.

A termination under ESA is a termination at common law

The Court rejected the argument that employment continues notwithstanding termination as defined under the ESA. The employer argued that an employee can be on a prolonged indefinite layoff, but terminated for the purposes of the ESA. However, the Court found that this would have an absurd result, where an employer could avoid the liabilities that flow from the terminating of an employee’s employment by placing an employee on layoff for an “indefinite period”. It was this result that the statute avoids, by stating that termination occurs once a layoff reaches 35 weeks in a 52-week period. The legislation leaves no room for the continued operation of the common law respecting when an employee is terminated.

However, the ESA does allow for the continued application of the common law in respect of the damages which an employee can claim upon termination. An employee who is not otherwise limited by an employment contract is free to choose to proceed by way of the remedies provided under the ESA or at common law. As confirmed by the Supreme Court in *Machtiger*,³ the employment standards set out in the ESA are minimum requirements only.

Constructive dismissal at common law

At common law, an employer has no right to layoff an employee. Absent a term or condition of employment to the contrary, a unilateral layoff by an employer is a substantial change in the employee’s employment, and constitutes constructive dismissal. However, even if an employment agreement allowed for a layoff of more than 35 weeks, it would be void as being inconsistent with the ESA. As confirmed by *Machtiger*, employers and employees can agree to provide greater benefits than those set out in the ESA, but they cannot contract out of the ESA minimum entitlements. The argument put forward by the employer in this case purported to do exactly that by extending a layoff for an indefinite time period. Therefore, even if the argument was accepted that employment status continues at common law after a statutory termination under the ESA, the employee could claim constructive dismissal whenever a layoff exceeds 35 weeks in a 52-week period.

In the result, the appeal was dismissed, and Mr. Elsegood was awarded costs of the appeal in addition to the common law termination entitlements awarded by the trial judge.

Our Views

This case is interesting in that it states that employers cannot place an employee on a layoff which exceeds 35 weeks in a 52-week period, under any circumstances. This decision will be of interest to employers who have, or who are considering laying off employees in the current economic climate.

It is important to note that collective agreements may have layoff provisions which supersede the provisions of the ESA, certainly as it relates to recall rights (i.e., some nexus of continuing employment), and therefore the discussion above is mostly applicable to non-unionized employees. Employers who are considering laying off unionized employees should carefully consider the applicable collective agreement, and consult legal counsel before proceeding.

If you have any questions regarding the obligations owing in regards to the layoff or termination of a specific employee, you should consult with legal counsel.

Randall Boessenkool is an associate practising in the Employment, Labour and Pension Group in Stikeman Elliott’s Toronto office. He advises clients on a variety of issues relating to employment and labour matters. This article was first published in Stikeman Elliott’s Canadian Employment and Pension Law online newsletter.

Notes:

¹ 2011 ONCA 831 (CanLII).

² 2011 ONSC 534 (CanLII)

³ *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986.

WHAT WOULD YOU DO . . .

. . . If an Employee Subjected to Co-Worker's Racist Remarks Insists that Co-Worker Be Fired?

Kristine had worked at Fraser College (the "College") in the housekeeping department for the last nine years. She identified as First Nations. One day she was having lunch in the College lunchroom with a number of her colleagues, including Patricia. The topic of nationality and culture came up and Patricia asked Kristine if she spoke her First Nations language. Kristine replied that she did not because during her childhood she had been removed from her family and placed in a residential school. At this point, Patricia interrupted and began speaking in a derogatory and inflammatory manner about matters involving the First Nations people. She referred to their living conditions as being "dirty" and spoke about a longhouse that she had visited. She used several expletives and reiterated a number of negative stereotypes associated with First Nations people.

Kristine was extremely upset by Patricia's comments and immediately reported the incident to Human Resources. The College conducted an investigation into the incident and found that Patricia's comments were discriminatory and violated the College's anti-discrimination policies. The College instructed Patricia to provide Kristine with a written apology and put her on notice that any further similar misconduct would result in the immediate termination of her employment. The College held "respectful workplace seminars" for the housekeeping staff, including Patricia, and retained a mediator with expertise in First Nations issues to hold a facilitation session with Patricia, Kristine, and other staff members who witnessed the racist comments. Patricia was also required to take a number of training courses to learn how to conduct herself as a manager in a respectful workplace. The College met with Kristine on a number of occasions to ensure that her concerns were addressed and also provided her with a letter of apology.

Patricia admits that she made inappropriate comments in the lunchroom. She reiterated to the College and to Kristine that she regretted making the comments and publicly apologized to Kristine. She also expressed an interest in restoring their working relationship.

Kristine insists that the College has not taken adequate steps to respond to the incident. She says that she experienced stress, depression, and anxiety as a result of Patricia's actions and feels intimidated by her. She feels that her concerns were not taken seriously and insists that the only satisfactory remedy would be the termination of Patricia's employment.

What You Need To Know

While employers have the right to run their business as they see fit, they must ensure that they comply with all applicable laws. Under human rights legislation, employers are responsible for developing non-discriminatory policies and procedures and ensuring that the work environment is free from discrimination. In addition, employers have the responsibility to promptly investigate an allegation of discrimination. If an allegation is substantiated, appropriate action, including disciplinary action, must be taken to stop the discrimination.

What Really Happened

When the College refused to terminate Patricia, the complainant filed an application with the British Columbia Human Rights Tribunal alleging discrimination in employment based on race, colour, and ancestry. The Tribunal dismissed the application on the grounds that the College and Patricia had acknowledged misconduct, expressed regret and apology, and positive and constructive steps had been taken to ensure a non-discriminatory workplace. As such, there was no reason to proceed with the complaint.

The Tribunal stressed that the College promptly investigated the situation and when it concluded that Patricia's comments were discriminatory and warranted sanction, the College disciplined Patricia and provided her with necessary training. Overall, the Tribunal found that the College's conduct demonstrated a "responsible, sensitive, prompt and proportionate response to the situation". The Tribunal also noted that the complainant continued to work for the College and regularly attended work after the incident. Further, there had been no indication of any similar comments or discriminatory conduct at the College since the incident.

(Based on *Corinne Baker v. Brentwood College School and Chris Nelson*, [2011] B.C.H.R.T. 335 (CanLII).)

LEGISLATIVE UPDATE

Federal

EI Benefits for Foster-to-Adopt Parents

The Government of Canada recently announced changes to the eligibility criteria for Employment Insurance ("EI") parental benefits for parents who commit to adopt children in their care.

Under a "Foster-to-Adopt" or similarly styled program, a child is placed for the purpose of adoption prior to the natural parents consenting to the adoption or relinquishing their rights. Previously, parental benefits were payable to the foster parents only after an application for adoption was submitted. Under the new requirements, the foster parents will become eligible for benefits as soon as a demonstrable commitment to adopt is shown.

Parental benefits under the EI program are provided to any parent (mother or father) to care for a newborn or newly adopted child. A maximum of 35 weeks of parental benefits is available, which can be shared between two parents.

Government Seeks Input on Pooled Registered Pension Plans

Concerned over the lack of adequate retirement income facing many Canadians, the federal government, in concert with the provinces, has proposed a new type of pension plan that would provide an alternative means of building retirement savings.

On November 17, 2011, Bill C-25, the *Pooled Registered Pension Plans Act*, received first reading in parliament. Section 3 states the purpose of the Act as follows:

[T]o provide a legal framework for the establishment and administration of a type of pension plan that is accessible to employees and self-employed persons and pools the funds in members' accounts to achieve lower costs in relation to investment management and plan administration.

On December 14, 2011, the Department of Finance released draft income tax legislation, regulations, and notes regarding pooled registered pension plans ("PRPPs") in a consultation package. The Department suggests that PRPPs will benefit Canadians' retirement options by:

- providing an accessible, straightforward, and administratively low-cost option for employers to offer their employees;
- offering an alternative plan to the self-employed and employees of companies who currently do not provide a retirement pension plan;
- allowing more people to benefit from lower management costs, which result from membership in a large, pooled pension plan;
- providing a pension savings vehicle that permits the portability of benefits to facilitate easy transfer between plans; and
- ensuring that funds are invested in the best interests of plan members.

The PRPPs would need to be implemented in concert with the provinces, which would require coordination of legislation.

The draft documents are available online at www.fin.gc.ca/drleg-apl/prpp-rpac1211-eng.asp. Interested parties may submit comments on the consultation package until February 14, 2012.

Comments can be sent to PRPPtaxrules-RPACreglesfiscales@fin.gc.ca or to:

Tax Policy Branch
Department of Finance
140 O'Connor Street
Ottawa, Ontario K1A 0G5.

Ontario — Occupational Health and Safety Initiatives

Proposed Regulation Concerning Reprisal Complaints

On December 16, 2011, the Ontario Ministry of Labour released a proposal for a new regulation under the *Occupational Health and Safety Act* ("OHSA") in regard to reprisal complaints. The regulation will prescribe the

functions of the Office of the Worker Adviser ("OWA") and the Office of the Employer Adviser ("OEA") respecting worker complaints of reprisals by employers (employer reprisals are prohibited by section 50 of the OHSA).

The proposed functions for the OWA include educating, advising, and representing non-union workers who file a reprisal complaint with the Ontario Labour Relations Board.

The proposed functions for the OEA include educating, advising, and representing small employers (with fewer than 50 employees) who wish to respond to a reprisal complaint.

Comments have been solicited from interested parties and will be taken into account during the drafting of the regulation. Written submissions are due by January 31, 2012 and can be emailed to webhspolicy@ontario.ca.

The Prevention Council Governance Framework

The Prevention Council was created as a result of amendments brought to the OHSA (at section 22.2) by Bill 160, which received Royal Assent on June 1, 2011. The first Chief Prevention Officer, George Gritziotis, has asked for feedback on the proposed Governance Framework by which the Council will pursue its main goal of improving worker health and safety in Ontario.

For more information visit the Ministry of Labour's Web site at http://www.labour.gov.on.ca/english/hs/prevention/governance_framework.php.

Mandatory Coverage in Construction Industry

The Ontario government has changed the *Workplace Safety and Insurance Act, 1997* making WSIB coverage mandatory for independent operators, sole proprietors, some partners in a partnership, and some executive officers who work in the construction industry. Starting January 1, 2012, the WSIB will begin a year-long education campaign to make sure that everyone impacted by mandatory coverage in the construction industry knows about the changes. On January 1, 2013, independent operators, sole proprietors, partners in partnership and executive officers in the construction industry will be required to have WSIB coverage.

WSIAT EXPANDS THE SCOPE OF ENTITLEMENT FOR TRAUMATIC MENTAL STRESS

— Charlotte Willson, LLB. of Heenan Blaikie LLP. © Heenan Blaikie LLP. Reproduced with permission.

A recent decision of the Ontario Workplace Safety and Insurance Appeals Tribunal ("the Tribunal") has significantly expanded the scope of entitlement for workplace events that cause traumatic mental stress.

In recent years, traumatic mental stress benefits have only been granted when a claimant experienced a traumatic event which presented a real or implied threat to a person's physical well-being. In *Decision 483/11*, the Tribunal held that a threat to a person's physical welfare is not required for a finding of entitlement to benefits based on traumatic mental stress.

The claimant in question was an educational assistant who sought benefits for mental stress after being falsely accused of striking a Grade 5 student in class. The claimant was suspended to allow the school to investigate the allegation, and was reinstated after being exonerated by the investigation. However, the claimant was diagnosed with major depression and was unable to continue her duties.

The Tribunal found that the false allegations and subsequent events were objectively unexpected and traumatic, and resulted in a disabling psychological condition. A report from the claimant's treating physician indicated that the claimant experienced flashbacks of the moment of her suspension, and avoided children and places like schools and playgrounds. Medical evidence also showed the claimant experienced sexual and emotional abuse in her childhood, memories of which were triggered by the incident.

In an earlier decision released in May 2011,¹ the Tribunal found that the claimant would be entitled to benefits for traumatic mental stress, but for an apparent requirement in the applicable Workplace Safety and Insurance Board ("the Board") policy,² that the traumatic event must involve a real or implied threat to a person's physical well-being. The Tribunal adjourned the claimant's application to receive submissions from the Board on an apparent inconsistency

between the Board's traumatic mental stress policy and the *Workplace Safety and Insurance Act, 1997* on this point, as well as inconsistencies within the Board policy itself. The Tribunal also asked the Board to clarify whether a diagnosis of post-traumatic stress disorder ("PTSD") is a prerequisite for entitlement under the Board's policy.

In response to the Tribunal's request, the Board advised that a real or implied threat to a person's physical well-being is not required to find entitlement to traumatic mental stress benefits. The Board also clarified that PTSD is not the only DSM-IV diagnosis that can form the basis for entitlement; any Axis I diagnosis may suffice.

After receiving the Board's response, the Tribunal granted the claimant benefits for traumatic mental stress.

Decision 483/11 is significant because it considerably widens the scope of compensable events in traumatic mental stress cases to situations that result in traumatic stress without the presence of a threat to physical well-being. As a result of this decision, employers should expect to receive more claims for traumatic mental stress. Employers can take some comfort, however, in the fact that all claimants seeking entitlement to traumatic mental stress have a significant evidentiary burden to meet. To be successful in a traumatic mental stress claim, it must be demonstrated that the claimant was exposed to a workplace event that is identifiable, objectively traumatic and unexpected in the normal course of the worker's employment, and that a disabling psychological injury occurred as a result, as demonstrated by an Axis 1 DSM-IV diagnosis.

We understand that none of the parties to *Decision 483/11* are seeking reconsideration or judicial review of the Tribunal's decision. *Decision 483/11* can be accessed at the following website: <http://canlii.ca/t/fmltw>.

If you would like to know more about *Decision 483/11* or the impact it may have on your workplace, please contact Charlotte Willson or any member of the Heenan Blaikie OHS & Workers' Compensation Practice Group.

Charlotte Willson is an associate in Heenan Blaikie LLP's Labour and Employment Group. Charlotte acts for employers in a variety of workplace matters and has particular expertise in workers' compensation, labour arbitration, human rights, employment standards and wrongful dismissal litigation. Charlotte has represented clients at the Ontario Court of Appeal, the Ontario Superior Court of Justice, the Workplace Safety and Insurance Appeals Tribunal, the Workplace Safety and Insurance Board, and the Human Rights Tribunal of Ontario, and before labour arbitrators and employment standards officers. Charlotte can be contacted by email at cwillson@heenan.ca or by telephone at (416) 643 6909.

Notes:

¹ *Decision No. 483/11*, 2011 ONWSIAT 1231, [2011] O.W.S.I.A.T.D. No. 1012.

² WSIB, "Traumatic Mental Stress", Operational Policy Manual, OP 15-03-02, online: www.wsib.on.ca.

ON THE CASE

Worker Argued He Would Not Have Been Terminated Had His Employer Complied with Its Obligations under Bill 168 with Respect to Workplace Harassment

Ontario Labour Relations Board, November 15, 2011

This was an application under section 50 of Ontario's *Occupational Health and Safety Act* ("Act"), in which the applicant, Murphy, alleged that his former employer, The Carpenters' District Council of Ontario, dismissed him from employment as a reprisal for having raised complaints about his immediate supervisor's conduct. Murphy alleged, among other things, that he was abused, harassed, and bullied by his immediate supervisor and that his employer terminated his employment shortly after he raised his concerns with management about his immediate supervisor's conduct. He argued that he would not have been terminated had his employer complied with its obligations under Bill 168 with respect to workplace harassment and thus addressed his harassment complaint properly. Bill 168 amended the Act to add requirements dealing with workplace violence and harassment. The employer asked the Ontario Labour Relations Board ("OLRB") to dismiss the application on the basis that the conduct did not amount to workplace harassment within the meaning of the Act. The employer also argued that the application should be dismissed because the complaint did not establish that Murphy was dismissed contrary to section 50 of the Act. Section 50 provides that an employer cannot dismiss a worker because the worker has acted in compliance with the Act.

The application was allowed. The OLRB noted that the workplace harassment and workplace violence provisions were recently added to the Act and have not been the subject of many decisions interpreting either the definition of

workplace harassment or the interplay between the workplace harassment obligations and the reprisal provisions in section 50 of the Act. As such, Murphy was permitted to have his reprisal complaint proceed to a full hearing.

Murphy v. Carpenters' District Council, 2012 CSHG ¶95,814

Action of Individual Employed By a Series of Unambiguous Fixed Term Contracts Was Dismissed

Ontario Superior Court of Justice, November 25, 2010

Van Mensel provided computer training to students of Walpole Island First Nation for 11 years on a series of fixed-term contracts. Each contract ran from September of one year until June of the next year. The terms of the proposal each year were negotiated, although the fixed term remained. She was not offered a contract for 2008, since her job was to become a permanent one. At that point, the employer was required by its own policy to post the position, and give a preference to First Nations applicants. Van Mensel brought a claim alleging that she was entitled to reasonable notice of termination.

The action was dismissed. The contracts were clear and unambiguous, and they were for the term of the school year only. The contracts could not be interpreted in a manner more favourable to Van Mensel. The contracts did not refer to renewal, there was no formal appraisal process, Van Mensel was not paid over 12 months, and she was never sure that her contract would be renewed each year. In addition, the employer could only contract Van Mensel, who was not a First Nations member, on a fixed-term basis.

Van Mensel v. Walpole Island First Nation, 2011 CLLC ¶210-054

No reasonable apprehension of bias would prevent a former Vice-Chair who has returned to private practice from presiding over a previously-commenced matter

Ontario Labour Relations Board, October 17, 2011

The union brought an application for certification and an unfair labour practice complaint before the Labour Relations Board (the "Board"). During the hearings, the vice-chair resigned from the Board to take a position with the United Brotherhood of Carpenters and Joiners of America. He was authorized to continue to preside over the cases. Islington Nurseries claimed that there was a reasonable apprehension of bias.

The motion was rejected. Historically, vice-chairs of the Board have experience in the private practice of labour and employment law. In addition, appointments as vice-chairs are for a maximum length of 10 years in total, at which point most outgoing vice-chairs return to employment, often in the private practice of law. The interchange between the private practice of law and the Board is not a basis for a reasonable apprehension of bias. Under the employer's argument, a vice-chair could continue to preside over a hearing only by retiring from all employment, or going to an area completely unrelated to labour law.

UWU v. Islington Nurseries Limited, 2012 CLLC ¶220-003

CASE COMMENT

Arbitrator Upholds Employer's Introduction of Biometric Scanner To Track Employee Work Hours

Gerdau Ameristeel is a multinational corporation with operations throughout North America and elsewhere in the world. One of its North American plants is located in Cambridge, Ontario ("GA Cambridge"), where some 180 unionized employees work in maintenance, shipping/receiving, the steel rolling mill, and the melt shop. For quite some time, GA Cambridge had been operating with an antiquated attendance management system, which was based on manual attendance management. There were no time cards or punch clocks. Instead, individual supervisors were responsible for recording employee hours worked, absences, and overtime hours for each day of the week into the computer. This manual attendance system did not work well. For example, supervisors based their data on observation and sometimes the supervisors could not properly observe their employees' comings and goings if they were assigned

to a more remote area of the plant. Further, advance approvals for vacation or overtime were often not tracked properly because they could not be entered into the system until the day in question, by which time the supervisor had often forgotten about the approval. As a result, at each payroll time, the entries produced by the system had to be reviewed line-by-line to look for and correct errors and this required hours of work by the Human Resources Department. To complicate matters further, the supervisors were not present at work on Monday mornings when the GA Cambridge Human Resources Department had to process the payroll for the week and forward it to the company's corporate offices in Florida. Even with the weekly line-by-line review, the error rate for the GA Cambridge payroll was three to four times the average North American error rate for Gerdau Ameristeel. Given these concerns, GA Cambridge began to work to seek out alternative methods of attendance management, ultimately deciding to implement a biometric scan system.

The biometric system considered by GA Cambridge was known as TimeLink WorkPoint 5000. The system was designed to enrol an employee when the employee presented a fingerprint to be scanned and was assigned an ID number. The system would then create an image of the fingertip by measuring the ridges and valleys of the fingertip. This image, however, was not an image of the fingertip itself, but rather it was immediately turned into a numeric template — a string of numbers and characters. No measurements were ever saved into the system. The use of the system did not involve any pain, irritation, or other physical consequences. On each subsequent scan, the employee's fingertip was compared with the templates in the system. The "clock in" and "clock out" data was not stored in the device but sent in real time to the Human Resources Department. Further, if an employee were to leave the company, the numeric template would be deleted by the system administrator. Many of the aforementioned safeguards were specifically created by the system administrator in order to respect the privacy rights of employees.

In December 2010, GA Cambridge met with the union, advised the union that it was considering implementing a biometric system for attendance management, and provided the union with the details described above. Notwithstanding these assurances, the union grieved the employer's planned introduction of the system on the basis that it violated the collective agreement. The union requested an order that the employer consider less intrusive means of attendance management and that it be ordered to consult with the union in this regard.

Before the arbitrator, the union argued that the unilateral introduction of a biometric system without consultation with the union violated the collective agreement and was too great an infringement on unionized employees' privacy rights. The union further asserted that GA Cambridge's justification for introducing the biometric system was not compelling and that the system would cause division amongst employees. Finally, the union maintained that a less intrusive system — such as a swipe card — would be sufficient. GA Cambridge countered by arguing that the introduction of the biometric system would be a proper exercise of management rights for the legitimate business reason of enforcing rules regarding hours of work and attendance. Further, GA Cambridge contended that it had fulfilled its duty under the collective agreement by notifying the union of its plans and responding to the concerns raised by the union in several meetings.

After listening to the arguments and hearing the evidence, the arbitrator ruled that the biometric system was a legitimate exercise of management rights and that its introduction would not violate the collective agreement. Accordingly, GA Cambridge was permitted to proceed. In her reasons, the arbitrator agreed with the employer that the system met the required test of the appropriate balance between the employer's right to manage employees and the potential intrusion on employees' privacy rights. Specifically, the arbitrator confirmed that any privacy concerns were appropriately dealt with by the safeguards that had been built into the TimeLink WorkPoint 5000 system. The arbitrator also noted that the safeguards in this case were even more stringent than those applicable to other scanning systems used by employers in previous arbitration cases where arbitrators had also found biometric scanning systems to be permissible. Finally, the arbitrator held that GA Cambridge had met its duty under the collective agreement by meeting with the union to explain the new system and working to respond to the concerns raised by the union.

This case is the latest in a series of similar arbitration decisions that have examined the use of biometric scanners in the workplace. The case is further evidence that biometric systems, when properly used by employers and when constructed with privacy concerns in mind, will be permissible in unionized workplaces in Canada.

Q & A

Is an Investigation Report Automatically Covered by Solicitor–Client Privilege When Prepared by a Lawyer?

Employers go to great lengths to ensure the confidentiality of their workplace investigations. However, where a workplace dispute is escalated to the point where formal proceedings are commenced, the obligation to disclose all relevant documents will supersede an employer's preference for confidentiality. While solicitor–client privilege will generally act as a valid defence to a production request, this privilege will not automatically attach to a document simply because the author happens to be a lawyer.

Such was the case in *North Bay General Hospital v. Ontario Nurses' Association*.¹ In that case, the Hospital argued that certain communications between its Human Resources personnel and a lawyer hired to investigate a claim of harassment were protected by solicitor–client privilege. In deciding that the requested communications were not protected by privilege, the Arbitrator noted that the purpose of solicitor–client privilege is to enable an individual to seek and obtain legal advice in a confidential manner. In the circumstances, there was no evidence to indicate that the Hospital had retained the lawyer for any other purpose other than to investigate the harassment allegations. The fact that the investigator happened to be a lawyer did not provide a sufficient basis to attach solicitor–client privilege to that relationship.

Notwithstanding the above, there are several steps that employers can take to increase the chances that their internal investigation reports will be found to be privileged and therefore remain confidential. Most importantly, where an investigation becomes necessary, employers should arrange with their legal counsel to engage the investigator and commission the investigation report. The final report should indicate that it has been prepared in anticipation of possible litigation and clearly be marked "privileged". Lastly, the circulation of the report should be severely limited.

Notes:

¹ 2011 CanLII 68580 (Parmar).

CCH WORKDAY

New Study Says Workplace Diversity Enhances Bottom Line

(Posted December 19, 2011)

The more diverse a company's workforce is, the more loyal, happy, and productive its employees tend to be, according to a new study led by a Ryerson University professor.

The commitment to diversity must be more than superficial, the researchers say.

"There are organizations that are doing what research and popular practice tells them to do. They are showing pictures of diverse workers on their website and say they have a commitment to diversity, but they're not really going beyond what people may see as simply window dressing," said Kristyn Scott, lead author of the study, *The Diverse Organization: Finding Gold at the End of the Rainbow*, and a professor with Ryerson University's Ted Rogers School of Management. "That's contrasted with an organization that has woven diversity into every fibre of its corporate culture and business practices."

Scott and her co-authors, Professor Joanna Heathcote of University of Toronto at Scarborough, and Professor Jamie Gruman, University of Guelph, conducted a review of about 100 studies, mostly from the U.S. but some from Canada and elsewhere, from 1991 to 2009. They evaluated the studies based on six key advantages of corporate diversity as outlined by Cox and Blake's framework, a U.S.-based study published in 1991, which are: recruitment, greater creativity, problem-solving, flexibility (better reaction to change), cost (employee turnover) and marketing (i.e., stronger financial performance).

The researchers broadly defined the term diversity to include ethnicity, age, gender, educational background, and professional experience.

While the researchers found mixed results on individual elements, they theorized that overall, the more organizations embraced elements of diversity in their corporate culture the more prosperous the company became and the happier and loyal its workforce.

"When you have an inclusive corporate culture, recruiting top talent becomes easier, group processes will be enhanced, which means employees are more likely to stay, which, in turn, increases the company's bottom line," said Scott, whose study has been published in the current issue of the journal *Human Resource Management*.

The study cited Campbell Soup Company as a shining example of a diverse organization. Highlights of the U.S. based-company's Catalyst award-winning diversity efforts include programs for its employees including women, gay, Hispanic and Asian-specific initiatives; its mission to consistently reinforce inclusion throughout all levels, from senior management to front-line workers; and training for managers on inclusive leadership, diversity awareness, and being aware of unconscious biases.

Scott says for organizations that just don't want to "talk the diversity talk, but walk the talk," it comes down to a cultural paradigm shift.

"By weaving diversity into the very fabric of the company, not only does this embrace its employees, it makes for a happier and more productive workforce."

Source: Ryerson University

More Than Half of Employers Will Increase Social Media Outreach in 2012 — SHRM Survey

In the next year, 55 per cent of surveyed employers plan to increase their social media efforts, according to a survey released by the Society for Human Resource Management (SHRM).

The survey, "An Examination of How Social Media Is Embedded in Business Strategy and Operations" found that 40 per cent of organizations have a formal social media policy. More than half (56 per cent) of social media policies include a statement regarding the organization's right to monitor social media usage. Other common policy components include:

- a code of conduct for employee use of social networking for professional purposes (68 per cent),
- a code of conduct for employee use of social networking for personal purposes (66 per cent), or
- guidelines for social media communications (55 per cent).

More than half (52 per cent) of organizations include social media as part of their marketing strategies, and marketing staff in 35 per cent of organizations lead social media activity.

"Right now, HR is often the go-to department for creating and enforcing social media policies," said Mark J. Schmit, Ph.D., SPHR, vice president of research at SHRM. "As social media becomes more defined in business beyond marketing activities, HR's role will continue to grow and evolve as well."

Other key findings include:

- More than one-quarter (28 per cent) of organizations have a social media strategy. Larger organizations and those with multinational locations are more likely to have a social media strategy than smaller employers and those with U.S.-based operations.
- Organizations with social media policies rely on their HR department to create (43 per cent) and enforce those policies (44 per cent).
- Besides marketing departments, information technology (17 per cent), HR (14 per cent), and management (14 per cent) lead social media efforts at organizations. More than a third (39 per cent) monitor their employees social media use on company-owned computers and hand-held devices.
- A third of employers (33 per cent) with a social media policy have disciplined an employee who violated the social media policy in the last year.
- Almost a quarter of organizations (21 per cent) use analytics or reporting tools to measure the return-on-investment for their social media efforts.

Source: Society for Human Resource Management, <http://www.shrm.org>.

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