

## LITIGATION

- *Employment Update*

SUMMER 2008

## The changing face of Human Rights complaints

*The new Human Rights regime will impact both employers and unions in dealing with the system.*

*By April Brousseau*

On June 30, 2008, the Ontario human rights system will move to a direct access model. This means that individuals will file their complaints\* directly to the Human Rights Tribunal of Ontario rather than have the Human Rights Commission act as “gatekeeper” and weed out, settle, or mediate many complaints before the hearing process.

For employee human rights complaints that originate in a unionized environment, this could lead to some significant changes for both employers and unions in how these complaints are now handled.

### POTENTIAL SHIFT FROM ARBITRATIONS

The current Commission has routinely rejected human rights complaints from unionized employees on the basis that the matter should more appropriately be dealt with under arbitration. As a result, unions have traditionally dealt with human rights complaints through arbitration, where they are guaranteed a hearing, rather than advising the union

member to file a human rights complaint.

That will now change. The Tribunal can no longer reject a human rights complaint unless the matter has already been dealt with appropriately in another forum. This means union members may now choose to pursue their complaint before the Human Rights Tribunal instead of using arbitration, and may do so without the support or knowledge of their union. While complaints theoretically could be ongoing in two forums at the same time, complainants in most cases will likely choose one forum or the other.

### HOW THIS IMPACTS YOU

The move to a direct access model may impact employers and unions in a few ways:

- **More complaints.** Unionized employees now have another avenue for launching a complaint, and this greater access may well lead to a greater number of complaints. In addition, complaints against unions may escalate as complaints formerly rejected by the Commission on the basis that they

*\*Under the new legislation, complaints will be referred to as “applications”.*

should be dealt with elsewhere will now proceed under the new system.

- **More successful complaints.** To help individuals advance their claims, the new human rights regime includes a Human Rights Legal Support Centre that will offer independent human rights-related legal and support services, ranging from advice and support to legal representation for complainants. This resource may lead to much stronger advocacy for plaintiffs in advancing their case.
- **Higher awards.** The monetary remedies available under the new system are substantially different than under the current system. In particular, the \$10,000 limit for damages for mental anguish has been eliminated, with no maximum in place. And because arbitrators have the power to interpret and apply human rights legislation, these broader remedies are available under both the Tribunal and arbitration routes.

While these are a few of the likely changes that will occur under the new human rights system, unforeseen impacts will undoubtedly emerge over time. Just as it took many years to determine the true influence of the Canadian Charter of Rights and Freedoms on individuals after it was introduced, it will take time before a true picture emerges as to how the human rights system in Ontario has evolved. □

## A vote of sanity in employee claims of bad faith

*A recent unanimous Ontario Court of Appeal decision puts limits on what qualifies as “bad faith” in the manner of termination.*

By Peter Biro

Wrongful dismissal isn’t what it used to be. Dismissed employees now look far beyond notice entitlements and severance to routinely include a claim for additional damages based on allegations of an employer’s bad faith or unfair dealings during the dismissal process.

These claims – known as “Wallace” damage claims after the leading Supreme Court of Canada decision on the issue – have become commonplace, and few plaintiffs fail to assert them in conjunction with their principal claims in wrongful dismissal actions.

The Ontario Court of Appeal has now raised the bar significantly for Wallace damage claims, in the case of *Mulvihill v. Ottawa (City)* released on March 25, 2008. In that case, the Court overturned an award of Wallace damages and set some key

parameters for these claims in the future.



### EMPLOYEE DISMISSED FOR CAUSE

The plaintiff was an employee of the City of Ottawa. In the fall of 2004, based on conflicts she was having with her supervisors, she made a complaint of harassment. She also went on sick leave at this time. The City made a thorough investigation of the complaint and dismissed it. The plaintiff wasn’t satisfied with the result and refused to return to work unless she was reassigned to another department.

In addition, rather than have the harassment decision reviewed through proper channels, she sent an email message of complaint about her supervisors to both the City Manager and the Mayor. As a result, the plaintiff was dismissed for insubordination. She sued for damages alleging wrongful dismissal.

The City of Ottawa pled a just cause defence, but amended the defence after the pre-trial discovery examinations and agreed to pay the severance amount specified in the employment contract. There was still a dispute over costs however, and the case went to trial.

The trial judge awarded severance under the contract plus an additional five and a half months as Wallace damages, finding bad faith for two reasons:

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1. The dismissal for cause was “not warranted”
2. The dismissal took place while the employee was on sick leave.

The City of Ottawa appealed the decision.

*Even if the Court agreed with the trial judge’s finding that the City made a “mistake” in dismissing the employee while on sick leave, a mistake alone is not conduct that is unfair or in bad faith.*

#### **WALLACE DAMAGES OVERTURNED**

The Court of Appeal overturned the Wallace damages award and disagreed with each of the two reasons for granting the award.

- **Just cause.** The Court of Appeal stated that the mere fact that just cause is alleged but not proven does not automatically mean that Wallace damages are to be awarded. So long as the employer has a reasonable basis to dismiss an employee for cause, it has a right to take that position without fear that it will be found to have acted in bad faith. In addition, abandoning a claim of just cause is not evidence of bad faith, as there are many reasons, including a willingness to compromise and reach a settlement, which could justify this action. The Court of Appeal found there was ample reason for the City of Ottawa to have concluded that a dismissal for cause was justified.
- **Dismissal while on sick leave.** The Court of Appeal found that the mere fact that the plaintiff was on sick leave at the time of termination does not necessarily mean that the dismissal was conducted unfairly or in bad faith. There must be other evidence of that type of conduct for a finding of bad

faith. Even if the Court agreed with the trial judge’s finding that the City made a “mistake” in dismissing the employee while on sick leave, a mistake alone is not conduct that is unfair or evidence of bad faith.

The plaintiff in this case was described by both courts as a “difficult” employee, and if anything, this case shows that it is possible to be mistaken so long as one is also dealing fairly with such an employee during the termination process without fear that an award of Wallace damages is inevitable. The City followed proper procedures, made many accommodations, and had a reasonable basis for concluding it could terminate for cause.

The case will be referred to often in future actions in which Wallace damages are claimed. □

## **Drug testing standoff**

*Both Alberta and Ontario have released leading cases on drug testing – but each has reached a different conclusion.*

*By Raj Anand*

Pre-employment drug testing is a critical issue for employers in safety-sensitive industries. But an employer’s ability to conduct such testing continues to be the subject of litigation. And as the court rulings continue, the legal waters grow murkier.

A recent Alberta Court of Appeal decision, *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, upheld an employer’s pre-employment drug testing program relating to a casual drug user who tested positive and was dismissed. The issue for employers? The case conflicts with a much earlier Ontario Court of Appeal decision that reached the opposite conclusion.

#### **ONTARIO’S STAND ON DRUG TESTING: ENTROP DECISION**

In its 2000 decision in *Entrop v. Imperial Oil Limited*, the Ontario Court of Appeal rejected pre-employment (and random) drug testing for employees on the basis that the technology used did not measure current impairment, only whether the drug was present in the body.

The Court determined that an employer who administers a drug test cannot tell whether that person is impaired at the moment or will ever likely be impaired while on the job. For this reason, the Court held that an employer could not justify pre-employment testing for employees in safety-sensitive positions as reasonably necessary to accomplish the goal of a safe workplace that was free from impairment.

*...the policy “not only treats all prospective employees who test positive for drugs the same, it treats them as if they were drug dependent and further assumes that they are likely to report to work impaired.”*

#### **ALBERTA DECISION SUPPORTS EMPLOYER**

The Alberta Court of Appeal released its decision in *Kellogg* in December 2007. The case involved a casual marijuana user who claimed to be discriminated against on the basis of perceived disability.

*Kellogg Brown & Root (KBR)* was a construction company helping Syncrude Canada in its plant expansion near Fort McMurray. KBR agreed to hire the plaintiff as a receiving inspector in 2002, pending successful completion of the company’s pre-employment medical and drug screening.

The plaintiff started work, but was told several days later that he had failed the drug screen. He admitted to using marijuana five days before the test and had assumed it would be out of his system. He admitted to being a casual marijuana user but was not drug dependent.

The Alberta Human Rights Panel upheld the KBR drug testing policy, ruling that it was not discriminatory on the basis of perceived disability. However, on appeal, the chambers judge overturned this finding and found discrimination, stating that the policy “not only treats all prospective employees who test positive for drugs the same, it treats them as if they were drug dependent and further assumes that they are likely to report to work impaired.” The Alberta Court of Appeal disagreed and upheld the employer’s drug testing policy, noting the lingering effect of cannabis in an employee’s system.

“The evidence disclosed that the effects of casual use of cannabis sometimes linger for several days after its use. Some of the lingering effects raise concerns regarding the user’s ability to function in a safety challenged environment. The purpose of the policy is to reduce workplace accidents by prohibiting workplace impairment. There is a clear connection between the policy, as it applies to recreational users of cannabis, and its purpose. The policy is directed at actual effects suffered by recreational cannabis users, not perceived effects suffered by cannabis addicts. Although there is no doubt overlap between effects of casual use and use by addicts, that does not mean there is a mistaken perception that the casual user is an addict.”

The Alberta Court expressly declined to follow the reasoning in the *Entrop* decision,

and held that pre-employment drug testing in safety sensitive positions was not discriminatory under the *Human Rights Act*, at least in respect of casual users.

**SUPREME COURT OF CANADA MAY RULE**

In April 2008, the Alberta Human Rights and Citizenship Commission sought leave to appeal the Kellogg decision to the Supreme Court of Canada. If the leave application is successful, the Supreme Court will be in a position to bring clarity to an area of law that has long been uncertain for employers.

In the meantime, employers who are considering the implementation of a drug-testing policy, or changing an existing policy, should be sure to get legal advice before introducing any testing procedures. □

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