



Cohen Highley
LAWYERS

EMPLOYMENT LAW UPDATE

September, 2009—Volume 3

Employment Contracts

As the economy recovers and employers begin increasing the workforce again, it is important to consider the use of written employment contracts. An employment contract is a contract that dictates the rights and responsibilities between an employer and employee. These should be seen as important safety measures in limiting future liability to laid off or terminated employees.

Employment law is a specialized area of contract law. Every employment relationship is a contract, regardless of whether or not there is an actual written contract in place. If there is no written contract in place, certain terms of the contract will be implied or assumed. These “implied” terms tend to work in favour of the employee.

There are two bodies of law that govern employment relationships in Ontario. The *Employment Standards Act* of Ontario (“ESA”) sets out the absolute minimum rights and obligations of employees

and employers in Ontario. Any written contract must be drafted in accordance with the *ESA*. If employers try to contract out of the minimum standards contained in this legislation, even with the employee(s)’ agreement, that term or agreement will not be legally enforceable. An employer can also face fines by the Ministry of Labour for having violated the *ESA*.

The common law, which is judge-made law, expands on the rights afforded by the *ESA*. The courts tend to be much more generous to employees than what is afforded to them under the *ESA*, especially in terms of severance pay. For example, a senior employee at a medium or large sized company with 20 years of service, who is dismissed or laid off, may be entitled to as much as 28 **weeks** of termination and severance pay under the *ESA*. However, if that employee chooses to take action in the courts, they could be entitled to as much as 20 **months** of severance pay, or more. This is a significant variance in liability to the

employer.

Employment contracts, if drafted properly, can be worded in such a way that an employee is limited to the smaller entitlement under the *ESA*. A few of the other major provisions to incorporate into such a contract include the following:

- Whether the employee is an independent contractor, or a term employee;
- Job Duties, Salary, Overtime, Hours etc.
- Disciplinary procedures;
- Alternative Dispute Resolution procedures;

Of course all employment contracts and policies in the workplace must also comply with the *Ontario Human Rights Code* and *Workplace Safety and Insurance Act*.

These contracts can go a long way in protecting employers from legal disputes and liability to employees down the road. For more information on employment contracts, please contact a member of the Cohen Highley Labour and Employment Law group. **CH**

Botched Workplace Investigations: Lessons Learned

Workplace investigations are a common response to employees complaints involving sexual or racial harassment, bullying, or even criminal issues like fraud. A case in point, *Stone v. SDS Beavers Dental* (“Stone”), is a warning as to what employers should not do when they conduct workplace investigations. This case involved a poorly executed workplace investigation SDS where the Court awarded damages for wrongful dismissal in the amount of 13 months to the

dismissed employee. The Court commented throughout the case on the myriad of problems with the workplace investigation that was conducted.

Stone was an employee who was in need of education as to appropriate conduct with female co-workers. He had a habit of poking or grabbing female co-workers in the ribs to surprise them as well as grabbing their legs as support to help him stand when he was sitting. Stone was inclined to act this way

when he drank on the job which he did increasingly toward the end of his tenure with his employer. While his female co-workers looked unfavourably on Stone’s behaviour, they did not find it to be sexual in nature.

The workplace investigation conducted by SDS was flawed for many reasons. First, an investigation was commenced without any formal complaint having been made. Instead the

cont’d Page 2

investigation was launched based on a male co-worker telling the human resources person that another male co-worker told him that four women were being harassed by Mr. Stone. Second, the human resources manager appeared to have been biased in the investigation from the outset. Rather than privately approaching women individually on a confidential basis to ask if there were any issues of harassment in the workplace, she asked the women to speak with her as a group and told them that something had to be done about Mr. Stone's behaviour. She told the four women that the purpose of the meeting was to hear from them regarding Mr. Stone's harassing behaviour and his drinking. Third, Mr. Stone was not told in clear terms what he was accused of having done. Had the employer told him directly that his drinking was problematic, Mr. Stone may not have completely denied all wrong doing as he ultimately did when confronted with unclear accusations. Mr. Stone should have been told the details of his unacceptable behaviour and the changes required of him to maintain his employment. Had Mr. Stone denied having done anything wrong or refused to apologize at that point then the employer would have been justified in terminating his employment.

In this case the Court found that the investigation was totally unacceptable and that the employer's argument

for cause could not stand. Based on the employee's 16 years of service, he was awarded 13 months of pay in lieu of notice (note that this award was increased for bad faith conduct by the employer – the law has since changed and notice periods are not to be extended in this way). This case found its way to the Ontario Court of Appeal which affirmed the lower Court's ruling. The Appeal Court was unimpressed that no steps had been taken by the employer to address the occurrences of harassment or alcohol use on the job even though it had policies as to how to address both of these issues. Had any of those policies been followed, SDS Kerr could have summarily fired Mr. Stone for his behaviour.

Employers should be careful when conducting workplace investigations and bear the following in mind:

- Employers should have workplace policies in place that address conduct that is expected in the workplace, and that conform with statutory human rights and workplace safety legislation. Not only should these policies exist, employees must be made aware of these policies.
- Employers should consider drafting policies that state how workplace investigations will be conducted and what will prompt a workplace investigation (i.e. will it be an external or an

internal investigator? Will it be based on a written or verbal complaint? Are employees entitled to have representation at a workplace investigation interview?). This way all workplace investigations will be consistently undertaken.

- The employee against whom the complaint is made must be assumed innocent of all allegations until the investigation is completed. The employee must be told of the allegations against him or her and given an opportunity to fully respond to the allegations made.

While most often a respondent will not suffer any adverse consequences while the investigation is ongoing, it may be helpful to have a policy in place that allows an employer to place the respondent on a paid leave of absence where the complainant feels at risk or there are serious allegations like sexual harassment involved.

If done incorrectly, workplace investigations can be a costly error for employers. Employer liability can be avoided, however, by creating clear workplace policies that set out the workplace rules and ensure that employees are aware of them, by enforcing those rules on a consistent basis, and by conducting a properly implemented workplace investigation for any breach. **CH**

The H1N1 Pandemic – Employer Liability in the Workplace

The H1N1 flu virus has been on everyone's minds in recent months, and concern about the spread of the illness has become a major workplace issue. For information on the H1N1 virus and how to protect yourself, visit the Public Health Agency of Canada website at www.fightflu.ca.

The H1N1 virus is contagious and is spread the same way as the seasonal flu virus, often through

coughing or sneezing. A key difference is that H1N1 germs can also live on hard surfaces such as countertops and doorknobs, and can be spread in this manner.

People have no natural immunity to the virus and a vaccination will not be available until November 2009. Nevertheless, employers have an obligation to protect their employees and must be prepared to deal with a potential

outbreak in the workplace.

Under the *Occupational Health and Safety Act*, employers have a duty to instruct, inform and supervise workers to protect their health and safety. This means employers have a duty to provide a safe workplace. A failure to do so could result in employer liability if employees become infected. The particular obligations of an employer will vary from industry to industry

based on what is reasonable in the circumstances.

In the context of a pandemic flu outbreak such as H1N1, this potential liability can be broken down into three main responsibilities:

1. **Duty to Educate**

Employers have a duty to inform their workers about the H1N1 virus and how it is spread. Workers should be educated about taking precautions against becoming infected. This includes stressing proper hygiene measures such as hand washing, wiping off hard surfaces and encouraging employees to not share food or drinks.

2. **Duty to Prevent Workplace Infection**

Employers also have a duty to take an active role in preventing workplace infection. This includes implementing preventative measures in the workplace and ensuring that they are followed by employees. Employers should consider providing anti-bacterial soap,

hand sanitizer and paper towels. Employers must also make an effort to keep hard surfaces clean. Posting signs to remind employees of proper hygiene measures is wise, as well as promoting social distancing and keeping workstations as far apart as possible.

One of the most important parts of prevention is to screen workers and visitors for signs of the flu. Anyone exhibiting or complaining of symptoms should not be allowed in the workplace, and those who have been in contact with someone exhibiting symptoms should also be screened.

3. **Duty to Accommodate and Allow Sick Leave**

Employers have a duty to provide employees with a fair and accommodating sick leave policy. If employees are sick or exhibiting symptoms, they should be made to stay home until they are well. Employees should not be punished for staying home sick, and employers should consider developing a work

from home policy to encourage people to remain at home until they are no longer exhibiting symptoms.

Employers must be careful to balance these duties with employees' rights under provincial Human Rights and Privacy legislation, as well as the *Employment Standards Act* and *Workplace Health and Safety Act*. Employers typically cannot enforce mandatory vaccinations or other policies which may be in contravention of such legislation.

Employers have a duty to provide a safe, clean work environment, and face potential liability if they fail to do so. That duty is heightened when there is a risk of a pandemic such as the H1N1 flu. In some cases, employees have the right to refuse to work if they have a reasonable fear of infection in the workplace, and this is something that employers want to avoid. Employers must be vigilant in protecting, educating, and providing proper hygiene and sick leave policies in the workplace, with the goal of reducing both infection rates and negative financial effects on the business. **CH**

* * * * *

Please contact Russell Raikes, Sarah Low or Stephanie Montgomery of our employment law group if you would like to discuss any of the information provided in this Employment Law Newsletter. You may also reach us by telephone at (519) 672-9330.



Russell Raikes
Partner
rraikes@cohenhighley.com



Sarah Low
Associate
low@cohenhighley.com



Stephanie Montgomery
Associate
smontgomery@cohenhighley.com



One London Place (Head Office)
255 Queens Ave., 11th Floor
London, ON N6A 5R8
T (519) 672.9330
F (519) 672.5960

Sarnia Office
411A—265 North Front St.
Sarnia, ON N7T 7X1
T (519) 344.2020
F (519) 672-5960

lawyers@cohenhighley.com
www.cohenhighley.com