

Human Rights Law: 2017 In Review

Monday, January 8, 2018

Human rights issues continue to be amongst the most common and tricky issues affecting employers today. Key developments in the case law reflect trends that employers are experiencing: sexual harassment, drug testing and addressing mental health in the workplace.

Sexual Harassment

The issue of sexual harassment was one of the top news stories of 2017 and directly relates to a human rights issue in the workplace. While sexual harassment is unfortunately not a new issue facing employers, as a result of the news flow we are finding an increase in the number of such complaints. We would recommend that employers take the following proactive measures to address the issue of sexual harassment in the workplace:

- Review your existing policies and consider whether they are sufficiently robust and whether additional tools are necessary to assist those within your organization who have responsibility for implementing your sexual harassment policy
- Ensure that your policy includes a complaint and investigation mechanism
- Consider how the findings in an investigation will be communicated to the parties involved in an investigation
- Train all employees on your policy on a regular basis
- Ensure that your policy is readily available to employees by posting it on your company intranet, in your employee lounge and emailing employees a copy and reminding them where electronic versions of the policy are located

For additional guidance on combatting sexual harassment in the workplace, please see "the 2.0 Approach to Sexual Harassment" in our [November Newsletter](#).

Human Rights Damages Update

In Ontario, a civil court has the jurisdiction to grant remedies for breach of the *Human Rights Code* (the "Code"). While there has been a limited amount of case law in relation to this remedial power, in the recent decision of *Doyle v. Zochem Inc.*, 2017 ONCA 130, the Ontario Court of Appeal found that both moral damages and human rights damages may be awarded for termination-related employer conduct that is unfair or is in bad faith and which causes the employee mental distress. Notably, the decision also affirmed that the *same* employer conduct may also justify an award for damages under the Code on the basis that these damages serve different purposes. For further details on this decision, please see our [April Newsletter](#).

Drug Testing

In 2017 the Supreme Court of Canada released its decision in *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30, whereby it upheld an employer's drug and alcohol policy (the "Policy"). The employer, Elk Valley Coal Corp., operated a mine in Alberta where the employee, Mr. Stewart, operated a loader. This was an extremely safety-sensitive workplace and the Policy required that all employees must disclose a drug or alcohol addiction. If they did, they would be offered treatment. However if they failed to disclose and were involved in an incident and

tested positive for drugs, they would be dismissed. This is precisely what happened to Mr. Stewart, who in post-accident testing, tested positive for drugs. He then disclosed that he thought he was addicted to cocaine; however, he was terminated for violating the Policy.

The Supreme Court of Canada upheld the decision of the Alberta Human Rights Tribunal which held that Mr. Stewart was terminated for breaching the Policy, not because of his addiction. While this decision is a significant win for employers in the realm of drug and alcohol testing policies, we caution employers that the nature of their operation, the manner in which their drug and alcohol testing policies are drafted, and the individual circumstances of each incident are crucial and will impact whether such a policy will be upheld in another workplace. For further details on this decision, please see our [August Newsletter](#).

In a not insignificant footnote to the issue of drug and alcohol testing in the workplace, in Ontario, the Toronto Transit Commission was successful in defending an injunction brought by Local 113 of the Amalgamated Transit Union, attempting to prevent the implementation of random drug and alcohol testing in safety sensitive positions. In *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078, the Ontario Superior Court found that the detection of drug or alcohol usage by TTC employees in safety critical positions was positive, and the implementation of the policy may act as a deterrent. The Court paid a significant amount of attention to the methods of testing being used by the TTC, to ensure that they were accurate, confidential and as minimally invasive as possible.

Mental Health in the Workplace

Effective January 1, 2018, the Ontario Workplace Safety and Insurance Board ("WSIB") entitles workers to benefits for chronic or traumatic mental stress arising out of and in the course of the worker's employment. This applies to accidents or incidents that occur on or after January 1, 2018. The new policies expressly state that workers are not entitled to benefits where the stress was caused by decisions or actions of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker, or to terminate his/her employment.

Employers who are subject to the WSIB regime in Ontario can expect to see an influx of claims for chronic or traumatic mental stress. For more information on the new policies, please see our [November Newsletter](#).

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