



# MURPHY'S LAW



What can go wrong will, especially in employment law. Here's a primer to help you keep up with legal changes and your organization out of court

BY RICHARD SKINULIS

Photography: Robin Wong

## CHANGES TO THE ONTARIO HUMAN RIGHTS TRIBUNAL

The Ontario Human Rights Tribunal is a quasi-judicial, independent agency that adjudicates cases of discrimination, harassment and reprisal under the Human Rights Code. In order to streamline the system, since June 2008 all new discrimination applications under the code are filed directly with the tribunal, instead of being referred by the Ontario Human Rights Commission, as was previously the case.

This is a significant move, but just how much is it going to affect HR departments?

"It will have a fairly big impact in terms of how cases dealing with human rights are litigated," says Malcolm MacKillop, a partner with Shields O'Donnell MacKillop LLP. "What we are seeing now is that when employees get terminated, they contend they are also the subject of a human rights code violation because, for example, they are disabled. The issue is going to be whether or not a court is going to be able to impose remedies that are under the Human Rights Code, such as reinstatement, back pay or damages for hurt feelings because of the breach.

Some employment lawyers believe the changes will increase the number of cases that go to the tribunal. Whether this will end up being more efficient is still of concern to many observers.

"Certainly the idea is that it will be quicker and more efficient," says Christine Thomlinson, a partner with Rubin Thomlinson LLP. "But the way the process is set up, it entitles anyone bringing a complaint to have a hearing—to which our initial response was: 'Are you kidding?' So many of the cases we see appear to have no merit and under the old system at least there was a mechanism that resulted in many of them not proceeding. We are being assured that there will now be some form of vetting, either in the form of an intake process or through mediation or officer review in advance of a hearing. That will be critical if the tribunal is to not get bogged down with cases that have no merit."

What is clear is that a faster, more litigious system means HR professionals will have to work harder at making their companies litigation-proof.

"The operative word is 'proactive,'" says Michael Sherrard, an employment lawyer with Sherrard Kuzz LLP. "In the old days when you had a human rights complaint, you filled out your response and then you waited from 18 to 24 days. The new process suggests there will be quicker disposition times." He also suggests having clear policies that are proactively communicated annually and provide some legal training for HR and perform internal audits to test its compliance rates.

**W**AY BACK IN 1986, THE relatively simple dismissal of an employee resulted in a landmark legal decision that is still reverberating through the HR profession. When the Supreme Court of Canada sided with Jack Wallace—who had been dismissed without cause after 14 years—against United Grain Growers Ltd., it set a legal precedent that changed the employment law landscape. In effect, the Supreme Court's decision in *Wallace* told employers that employment relationships are extremely important and if they did things that can be seen as irresponsible and inappropriate, they were going to be punished.

This was a groundbreaking case—employers suddenly had to consider the effect dismissal had on the mental and social well-being of employees. They had to consider how the dismissal was done, not just why. And that was just the thin edge of a legal and cultural wedge that has changed and complicated labour and employment law over the past 20 years.

Of course, changes to the legal environment are being seen in other areas too, such as evolving demographics and the surging use of communications technology in the workplace. But they are also driven by society's increasing focus on human rights. It's no coincidence that the Ontario Human Rights Tribunal was recently allowed to take over workplace grievance functions (see sidebar right). This trend appeared to be given further impetus by another well-known landmark case, *Keays vs. Honda Canada Inc.* However, the Supreme Court recently set aside damages awarded against Honda by lower courts, which has at least slowed the pendulum swing in favour of employees (see sidebar on page 33).

*Wallace*, plus more recent ones—including a Canadian Human Rights Tribunal decision against the RCMP, about a cadet who was racially taunted during training; the Supreme Court's decision in *McKinley vs. BC Tel*, which stressed that the nature and context of alleged misbehaviour must be considered in assessing just cause for dismissal; and the Ontario Court of Appeal's decision in *Simpson vs. Consumers' Association of Canada*, which addressed sexual harassment in the workplace and the duties of a manager/employer—all demonstrate that the legal playing field is being levelled in favour of human rights.

"One of the biggest HR developments over last 10 to 15 years," says Malcolm MacKillop, an employment litigator with Shields O'Donnell MacKillop LLP, "is that, in terms of the courts, there is a very strong sense that employees don't have as much bargaining power as employers. But the reality is that in areas of dismissal or human rights—and particularly disability—employers don't succeed that often."

### ACCOMMODATING THE DISABLED

The issue of workplace disability accommodation has become more complex over the past few decades. For one thing, it is not always about physical disabilities, which can often be accommodated in the workplace relatively simply with special software or ramps. Mental disability, however, is another matter. It could manifest, for example, as someone who is off on a disability leave and is not communicating with their employer because they are experiencing a major depressive episode.

CLOCKWISE FROM TOP LEFT:  
1. MALCOLM MACKILLOP,  
SHIELDS O'DONNELL  
MACKILLOP 2. MICHAEL  
SHERRARD, SHERRARD KUZZ  
3. HUGH CHRISTIE, GOWLINGS  
4. JOHN MARTELLI, BRUCE  
POWER 5. CHRISTINE  
THOMLINSON, RUBIN  
THOMLINSON

Christine Thomlinson, a partner with Rubin Thomlinson LLP, warns that “these cases are fraught with legal landmines.” In dealing with an employee with mental illness, Thomlinson advises assuming a judge or human rights commission will one day review everything and to map out a strategy accordingly. The key concept, she says, is: “Taking care to recognize the more vulnerable employee in the employment relationship is always going to serve HR people well.”

**THE AGED**

As the population ages, retirement issues are going to be more common. Recent legislation in Ontario dictates that not only can employers not force someone to retire when they are 65 (or older), they must also accommodate the frailties that come with age. The real challenge for employers now is managing the

easily provable, but you’re starting to slow down a step or two.”

If that 75-year-old is not performing their job up to standard,

discriminated against because of their family status.

If the employee is a professional—such as a lawyer, accountant or

“Employees have become much more litigious over the last 15 years.”

do you have to show that a bona fide occupational requirement is not being met? “The trouble is there hasn’t been a lot of case law developed to help employers over this,” says Christie.

**NEW PARENTS**

The combination of disability and human rights can sometimes have unexpected outcomes for the HR professional. Take maternity leave, for example. What is happening a

engineer—whose charge-out rate (and, therefore, compensation) is based on their experience, the problem is magnified. “If you fall behind in your level of experience in a profession such as law, it’s more difficult to justify to the client the same hourly rate. And yet according to human rights legislation, your compensation is generally driven off your hourly rate. So the employer is between the law and the needs of the client.”

1960

1950

1955

1960

1965

1970

1975

19

*Bardal vs. Globe and Mail (1960)*

Established “Bardal factors”—the primary elements of determining what an employee’s reasonable notice period should be (such as character of the employment, length of service, etc.).

*Machtinger vs. HOJ (1992)*

Employment contract provisions stipulating statutory minimum termination compensation are void and will not be taken into consideration in assessing an employee’s reasonable notice period.

tail end of a long, productive career. “Let’s assume that you are a normal 75-year-old,” says Hugh Christie, partner and head of Gowlings LLP’s labour and employment group. “And you don’t have a condition—like Alzheimer’s—that is

lot is that many women (and some men) exercise maternity leaves but then come back and realize they are now two grades below their peers who didn’t take leave, says Christie. The necessary legal implication is that they cannot be

**NAVIGATING DISMISSAL**

Given the general trend in favouring the employee over the employer in the courts and labour panels, nowhere is the old adage that an ounce of prevention is worth a pound of cure more

# ASSESSING KEAYS VS. HONDA CANADA INC.

The Supreme Court of Canada's June decision in *Keays vs. Honda Canada Inc.* had employers breathing a collective sigh of relief after the court set aside a \$100,000 punitive damage award against Honda Canada, finding there was no evidence the automaker had discriminated against Keays.

The decision brings an end to a long battle that had been closely monitored by HR professionals and employment experts across the country.

The case has been before the courts since 2005, when the Ontario Superior Court of Justice found that Honda Canada had wrongfully dismissed Kevin Keays and breached his human rights by discriminating against him on the basis of a disability—chronic fatigue syndrome. The court awarded Keays two years' pay in lieu of notice, including a "Wallace bump" due to the bad faith exhibited by Honda Canada, plus \$500,000 in punitive damages against the employer—a record in a Canadian employment law case. The punitive damages award was reduced to \$100,000 on appeal but the vast remainder of the lower court's decision was upheld until it was ultimately set aside by the Supreme Court in June.

But does the decision represent a judicial sea change in favour of employers?

"To some degree the Supreme Court decision in *Honda* has neutralized *Wallace*, but it hasn't wiped it out," says Michael Sherrard, an employment lawyer and partner with Sherrard Kuzz LLP. "What it says is, 'Here are the boxes into which evidence must fit in.' I think it's a well-written decision that answers a lot of questions that have arisen since the first cases following *Wallace*."

In favour of employers, the decision should dissuade employees from alleging human rights violations to support large damage claims, which will, hopefully, stop the trend of sky-rocketing damages awards in employment law cases.

However, the ultimate lesson to be learned from *Keays* is not that employers should forgo proactively managing disability cases (including using doctor's notes as an attendance management tool), but that they always act fairly in its dealings with employees. Employers must always consider how outsiders—like the courts or tribunals—view its treatment of employees.

appropriate than in cases of dismissal. Avoiding a costly court case or even reducing the ultimate cost of a legal fight means taking a respectful approach to termination, accompanied by due diligence and the help of a good employment lawyer. Two cases handled by Thomlinson's firm exemplify this.

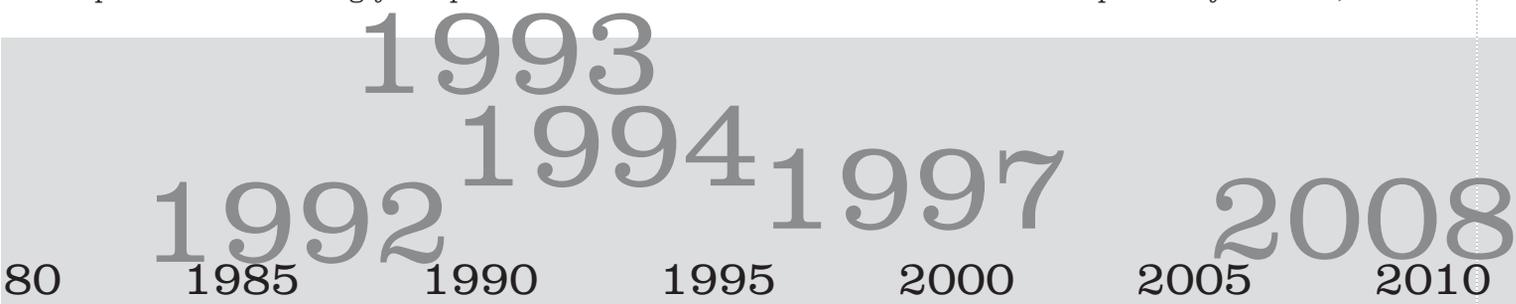
In one, a company had a bad theft problem and strongly suspected

relied upon to support their decision of termination.

"The evidence was not perfect," says Thomlinson, "but, when added to their own circumstantial evidence, it certainly went a long way towards convincing a court that this employer did not act hastily and took all reasonable steps before making a decision to conclude the employment relationship with this individual."

er had a chance to terminate the relationship, the employee had an accident (outside of work) and went on disability leave.

This new wrinkle stopped the employer in its tracks since terminating the employee might be perceived as a response to the disability leave, prompting an allegation of discrimination. A further possibility was that, not know-



***Queen vs. Cognos (1993)***

A potential alternative to wrongful dismissal is established: an employer's misstatement induced an employee to accept a job, resulting in a claim for damages based on negligent misrepresentation.

***Francis vs. CIBC (1994)***

A new contract imposed on an employee in the course of an existing employment relationship will be ineffective to reduce an employee's pre-existing rights to notice.

***Farber vs. Royal Trust (1997)***

Supreme Court of Canada officially endorsed principle of constructive dismissal.

***Evans vs. Teamsters (2008)***

A dismissed employee's unreasonable failure to accept a recall back to work in the same or comparable position will result in a denial of the employee's claim.

an employee—who happened to be pregnant. Given her condition, the company was very reluctant to terminate her. So, they retained an investigation firm to assist them in obtaining further evidence of theft against the woman, which they later

Terminating people with disabilities can also be tricky. Thomlinson remembers a case in which a company was preparing to fire an unsatisfactory employee coming to the end of her probationary period. Unfortunately, before the employ-

ing the full extent of the employee's injuries, the termination might worsen her condition, resulting in additional legal liability. Ultimately, the termination was delayed to allow the employee to exhaust her disability benefits and provide the

employer with an opportunity to better assess the employee's medical state.

"The termination was eventually conducted carefully and effectively, with the full support of the employee's legal counsel," explains Thomlinson, "and after we worked with the employer to collect evidence to help demonstrate that the decision had been made prior to the accident."

#### AVOIDING MISTAKES

Sometimes employers make the mistake of trying a "heart-to-heart" conversation with a struggling employee to discuss concerns. This can make things worse, says Thomlinson.

"This may make sense if there's a real desire to support the employee back to acceptable performance," she says. "However, in our experience, this is done because either the employer thinks they have a legal obligation to have such a meeting before terminating (which they do not) or the employer hopes it will prompt the employee to quit once they see the writing on the wall." In either case, Thomlinson says, the end result of such a meeting is usually the commencement of a disability (usually stress) leave, leaving the employer with limited options going forward.

One way to avoid this problem is to work more closely with counsel either outside or inside the company. One man who agrees is John Martelli, senior legal counsel and corporate privacy officer at nuclear power generator Bruce Power. "Employees have become much more litigious over the last 15 years," he says. "They know their rights, in part because of the Internet."

Martelli is a firm believer in HR and corporate counsel combining

efforts, but he also understands there can sometimes be territorial disputes between the two functions. These can be resolved when both sides realize what the other offers. "Human rights law is a very specific, very specialized field," he explains. "I get the updates, I go to conferences, I read case law—that's my job, and HR realizes I can help them. I realize that HR people have skills a lawyer doesn't. They know the business better than I do—the collective agreement for example."

Mediation is another way to avoid litigation, and one that employment lawyers say is underused.

"You could have an early mediation when the claim is about to start," says MacKillop, who gives courses on litigation avoidance. "If you don't get a deal, maybe have another mediation after pre-trial examinations." He says the key for employers is to be open to the possibility of creative solutions to litigating—like building a clause that requires employees to go to arbitration into their employment contracts, for example.

One way or another, business always comes down to money—and litigation is expensive. But sometimes you have to spend money to save money.

"Employers are always allocating money towards legal fees but don't always know how best to use their legal allowance," says Thomlinson. "But if you think about the legal fees that come with defending against this kind of litigation, especially at the Human Right's Commission—which may increase since the changes last June. **HR**

*Richard Skinulis is a Toronto-based author and freelance writer.*

## HR LAW IN THE FACEBOOK AGE

Our burgeoning use of the Internet and other communication technologies are also making big waves in HR law. Pictures posted to a website can go viral worldwide in minutes, so the idea of someone behaving badly wearing the company logo has vast implications. And social media like Facebook have become public places with permanent records of what employees might have to say about their workplaces.

"Not everyone who jumps onto these sites are aware that they have just lost any hope of privacy," says Michael Sherrard of Sherrard Kuzz LLP. "You have to talk to your employees about things like language or potentially threatening online conduct."

He says attempts to settle this in the courts have turned on questions such as, was a policy clearly communicated and was there consistent accountability across the workforce?

"But it should be a practical policy," Sherrard stresses. "Some companies have adopted a zero tolerance (absolutely no personal computer use on company time or barring access to Facebook), but is this realistic today when we have people working long hours to say they can't order their groceries, or talk to a friend or their children online?"