MANAGEMENT
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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

'Canadian work experience' not a legitimate basis to disentitle jobs to newcomers – so says Ontario Human Rights Commission

On July 15, 2013, the Ontario Human Rights Commission (the "Commission") released its latest policy entitled "Removing the 'Canadian Experience' Barrier" (the "Policy"). Intended to address one of the barriers identified by immigrant groups to finding jobs in Canada, the Policy recommends employers amend their recruitment and hiring practices to de-emphasize 'Canadian work experience' as a qualification for hiring.

The 'Canadian Experience' Conundrum

According to Statistics Canada, lack of Canadian experience has been identified as the most common barrier for newcomers looking for meaningful employment in Canada. This sentiment is echoed by the Commission which has found, "when facing a requirement for Canadian experience, newcomers are in a very difficult position: they can't get a job without Canadian experience and they can't get Canadian experience without a job." A similar challenge presents itself when a newcomer seeks professional recognition or accreditation of experience gained outside Canada.

As a result, many newcomers find themselves working in unpaid positions in an effort to gain some form of Canadian work experience. While potentially beneficial to the newcomer, unpaid work can expose Canadian employers to unanticipated liability under applicable employment standards legislation (for more information regarding the risks of unpaid internships see our *Management Counsel* newsletter Vol. XII, No. 3 June 2013).

The Commission's Recommendations – Do's

The Policy provides a number of suggestions to assist employers (including regulators) to remove Canadian experience barriers. Key suggestions include:

- Reviewing job requirements and descriptions, and recruitment and hiring practices to ensure they do not present barriers for newcomer applicants
- Taking a flexible and individualized approach to assessing qualifications
- Using competency-based methods to assess an applicant's skill and ability to do the job

continued inside...

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October 2013 Vol. XII No. 5

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- Considering all relevant work experience – regardless of where it was obtained
- Framing job qualifications or criteria in terms of competencies and job-related knowledge and skills

Of some concern, the Policy also suggests broad-based 'best practices' including that employers:

> "Examine their organizations as a whole to identify potential barriers for newcomers; address any barriers through organizational change initiatives, such as by forming new organizational structures, removing old practices or policies that give rise to human rights concerns, using more objective, transparent processes, and focusing on more inclusive styles of leadership and decision-making."

Clearly, it will take time to see how the Human Rights Tribunal of Ontario ("Tribunal") will interpret such vague recommendations.

The Commission's Recommendations – Don'ts

The Commission has also set out a series of actions employers should *avoid*, including:

- Requiring applicants to have prior work experience in Canada
- Requiring qualifications that could only be obtained by working in Canada
- Discounting an applicant's foreign work experience or assigning it less weight than their Canadian work experience
- Requiring applicants to disclose their country of origin or the location of their work experience on the job application form
- Asking applicants questions that may directly or indirectly reveal where their work experience was obtained
- Asking for local references only

Advice for Ontario Employers

Commission policies are neither considered law nor binding on employers. However, they are used by the Tribunal when interpreting and applying the Ontario *Human Rights Code* ("*Code*"). Ontario employers are therefore encouraged to take note of the practices recommended in the Policy when designing their own external and internal recruitment procedures.

Remember also that, as with virtually all *Code* requirements, it is not enough to ensure the *result* of a recruitment process is compliant with the law. It is equally important to document the *process*. This includes retaining copies of all job postings or advertisements and any evidence demonstrating the candidate's qualifications and experience were accessed objectively and without regard to *where* the qualifications or experience was obtained.

For more information and/or for assistance revisiting your organization's recruitment and hiring practices, contact a member of Sherrard Kuzz LLP.

*In this edition of Management Counsel we welcome an article by **Michael Wagner**, a lawyer with the law firm **Roper Greyell**, in British Columbia, a member of the Employment Law Alliance. Michael will also join us at our November 20, 2013 HReview Breakfast Seminar at which a panel of experts will lead a lively discussion on **A Cross-Canada Look At Employment and Labour Law** (see invitation on back page of this newsletter).*

A Costly Termination Provision

Michael Wagner
Roper Greyell

Late last year, the Ontario Superior Court of Justice issued *Stevens v. Sifton Properties Ltd.*, 2012 ONSC 5508 ("*Stevens*"). The case serves as an important reminder to employers that courts will only uphold restrictive severance entitlements if contractual termination provisions are absolutely airtight.

The Context

Ms. Stevens began employment with Sifton Properties Ltd. ("Sifton") in May 2007 as a golf pro. In January 2008, she was promoted and signed a new employment contract which contained the following termination provision:

> (a) The Corporation may terminate your employment for what it considers to be just cause without notice or payment in lieu of notice;
>
> (b) The Corporation may terminate your employment without just cause at any time by providing you with notice or payment in lieu of notice, and/or severance pay, in accordance with the Employment Standards Act of Ontario;
>
> (c) You agree to accept the notice or payment in lieu of notice and/or severance pay referenced in paragraph 13(b) herein, in satisfaction of all claims and demands against the Corporation which may arise out of statute or common law with respect to the termination of your employment with the Corporation.
>
> [emphasis added]

Courts will only uphold restrictive severance entitlements if contractual termination provisions are absolutely airtight.

In October 2010, Sifton terminated Ms. Stevens' employment without cause, effective immediately. Ms. Stevens was told she would receive three weeks' pay in lieu of notice in accordance with paragraph (b). Sifton also told her it would continue her group benefits for the three week notice period, pay out her outstanding vacation pay, and pay a discretionary bonus for the partial 2010 year.

The Arguments

At trial, Ms. Stevens argued the termination provision was unenforceable because:

1. It referenced specific employment standards legislation no longer in existence at the time of the employment contract in January of 2008.
2. The provision lacked the clarity required to displace the common law presumption of reasonable notice. In particular, it was not sufficient to reference the legislated minimum period of notice without further stating that this was also the maximum notice required.
3. The provision violated the applicable employment standards legislation by effectively denying Ms. Stevens her statutory entitlement to benefits required during the notice period.

The Outcome

The Court rejected the first argument, finding that the intention of the parties was to refer to the *Employment Standards Act, 2000*, rather than the *Employment Standards Act of Ontario*, which had been repealed and replaced several years prior to the signing of the contract. The Court held that the parties intended to reference the province's employment standards legislation "that would be applicable into the future, during the parties' contractual relationship, however long that lasted" (para. 23). Although it would be more precise to use language such as "*Employment Standards Act*, as amended", that was not strictly necessary.

To be enforceable, termination provisions must expressly and clearly provide all pay and benefits mandated by employment standards legislation including severance pay, vacation pay, statutory holiday pay and the continuation of benefits.

The Court also rejected the second argument, finding that the termination provision met the high standard of clarity required in order to displace the common law presumption that employees are entitled to "reasonable notice" of termination. The Court noted a relatively consistent line of Ontario authority confirming that an employment contract specifying a minimum notice period is sufficient to displace the common law presumption.

However, the Court accepted Ms. Stevens' third argument. It noted that the termination provision failed to expressly refer to

Sifton's statutory duty to maintain Ms. Stevens' benefits for the contractual notice period. Instead, it expressly limited Ms. Stevens to severance pay. The fact that Sifton did, in fact, provide Ms. Stevens notice period benefits did not cure the provisions' fatal defect. As a result, the termination provision was null and void for all purposes and Ms. Stevens was entitled to the much more generous common law reasonable notice of termination.

The Bottom Line for Employers

This case highlights the care employers must take when drafting termination provisions. To be safe, employers should review their existing employment agreements, and any templates they might have, to ensure the termination provisions are current and enforceable.

To be enforceable, termination provisions must expressly and clearly provide all pay and benefits mandated by employment standards legislation including severance pay, vacation pay, statutory holiday pay and the continuation of benefits. If they do not, employers invite expensive and protracted litigation and may be liable for much more costly severance terms.

Finally, employers with operations in multiple Canadian jurisdictions must ensure compliance with locally applicable legislation and jurisprudence, both of which differ among the provinces.

DID YOU KNOW?

***Canada Labour Code* Amendments Impact Uninsured LTD Programs**

Effective July 1, 2014, all prospective (*i.e.*, not already existing or applied for) LTD benefits offered to employees covered by the *Canada Labour Code* must be insured with an insurance company licensed under the laws of a province.

To learn more, contact a member of Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

2013 - A Cross-Canada Look at Employment and Labour Law

Employers operating in multiple Canadian jurisdictions know that a "*one size fits all*" approach to employment and labour law simply doesn't work. In Canada each province and the federal government (for federally regulated employers) governs its own employment and labour law.

Join us as experts from **three of Canada's leading employment and labour law firms** discuss key similarities and differences among three of Canada's principal employment and labour law regimes:

Sherrard Kuzz LLP – Ontario **Roper Greyell – British Columbia** **Lavery LLP - Quebec**

Termination Entitlements

- When can an employer terminate employment?
- What is an employee owed on termination?

Employee Privacy Rights

- Is there such a thing as an employee "right" to privacy?
- Can an employee demand to see his/her personal workplace information?

"Employer Free Speech"

- What can an employer say and/or do during a union organizing campaign?

Workplace Harassment

- What are an employer's obligations?
- What is the potential liability for not meeting these obligations?

DATE: **Wednesday November 20, 2013; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre,** 75 Derry Rd West, Mississauga ON L5W1G3

COST: Please be our guest

RSVP: **By Friday November 8, 2013 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

HRPAO CHRP designated members should inquire at www.hrpa.ca for certification eligibility guidelines regarding this *HReview Seminar*.

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Jean Cumming Lexpert® Editor-in-Chief

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