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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

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Holiday Party Dos and Don'ts

As the holiday season approaches, it's time to revisit the law of employer host liability. If your organization plans to host a workplace holiday party where alcohol or other legal intoxicants may be served or consumed, you'll want to protect your employees from harm and your organization from the potential for significant liability for damages sustained or caused by an impaired employee.

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The law of "host liability" – a refresher

The 2001 decision, *Hunt v Sutton Group Realty* ("*Sutton Group*"),[1] is a good illustration of the scope of the duty of care that may be owed by an employer to an employee who becomes impaired at a company event and hurts themself.

In *Sutton Group*, the employer was found partially liable for injuries an employee, Ms. Hunt, suffered during a car accident that occurred while Hunt was driving home from the office holiday party. At the party, Hunt had consumed alcohol made available through an unsupervised open bar. After the party, she and a number of other employees went to a pub where they consumed additional alcohol.

At the trial, the employer argued it was not responsible for Hunt's injuries because it had taken all reasonable steps to protect her from injury and it was unreasonable to have expected the employer to do more. Specifically, the employer noted the following:

- It had offered a taxi to all employees at the party.
- Recognizing Hunt was impaired, it had asked Hunt if she wanted her husband to be contacted to pick her up.
- It had refrained from putting Hunt into a taxi because it was concerned this may amount to false imprisonment or even kidnapping.
- It was not possible to monitor the alcohol consumption of all employees.
- It was not possible to anticipate Hunt would stop for a drink on the way home from the party.

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The trial judge rejected each argument and found the employer had breached its duty of care and was negligent. The employer and pub were held jointly liable for 25 percent of the damages suffered by Hunt who was held 75 percent liable on the basis of self-induced alcohol consumption:

> ...I find that the defendant Sutton, as the plaintiff's employer, did therefore owe a duty to the plaintiff, as its employee to safeguard her from harm. This duty to safeguard her from harm extended beyond the simple duty while she was on [the employer's] premises. It extended to a duty to make sure that she would not enter into such a state of intoxication while on [the employer's] premises and on duty so as to interfere with her ability to safely drive home afterwards...

As for the additional drinking while at the pub, the court held this "intervening act" did not absolve the employer from liability as the employer should have reasonably foreseen or anticipated this result.

The employer appealed and while the Court of Appeal allowed the appeal and ordered a new trial on both liability and damages, it did so for reasons unrelated to the trial judge's comments on an employer's duty of care; that part of the decision remained unchanged.[2]

Sutton Group was cited in the 2021 Supreme Court of British Columbia decision, *McLaughlin v. Cerda* (*"Cerda"*),[3] in which the employer was held not to have breached its duty of care to an employee who became impaired after, not during, a work social event. The court noted that the duty of care does not require an employer to take steps to protect an employee after they leave an employer-sanctioned event in a sober state, nor to warn another establishment an employee may be on their way to that establishment. The duty of care and host liability is only triggered if the employee becomes intoxicated at an employer-sanctioned event.[4]

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Holiday party best practices

As *Sutton Group* demonstrates, an employer can be held responsible for the damage suffered by an employee who becomes impaired at a company sponsored event. As such, short of a total ban on intoxicants while at a workplace event, employers may wish to consider any or all of the following best practices:

- Do not have a self-serve, open bar. Instead, retain the services of a professional bartender trained to identify and appropriately deal with an impaired employee.
- Offer a cash bar.
- Establish a drink ticket system.
- Provide non-alcoholic beverages, and food.
- Designate a team leader to monitor consumption and assist anyone who has become impaired and requires transportation.
- Address impaired employees immediately; do not wait until they are about to leave.
- Make transportation or lodging arrangements and communicate them to guests, preferably before the event. This may include:
  - A driving service (e.g., taxi, or other paid service)
  - Carpooling with designated drivers
  - Discounted hotel rooms near the event
- Require impaired employees to turn over their car keys. If an employee insists on driving, call the police.
- Ensure senior management leads by example.
- Have appropriate liability insurance in place.

Finally, we recommend every workplace have a policy regarding the use of legal intoxicants at the workplace or a company sponsored event. The policy should emphasize the employer's concern for employee safety and make clear the expectation that employees not consider a work event an opportunity to 'party' to excess.

Let's all have a happy and safe holiday season!

To learn more and/or for assistance preparing for this holiday season, contact a member of the Sherrard Kuzz LLP team.

[1] *Hunt v Sutton Group Realty*, 2001 CanLII 28027 (ON SC). Note, this decision was appealed in *Hunt v Sutton Group Realty*, 2002 CanLII 45019 (ON CA). The appeal was allowed on grounds other than the duty of care.

[2] The matter ultimately resolved before a new trial was held.

[3] *McLaughlin v. Cerda*, 2021 BCSC 979.

[4] *Ibid* at paras 56-57.

DID YOU KNOW?

As of December 15, 2023, occupational health and safety regulations under the *Canada Labour Code* require a federally regulated employer to provide menstrual products in all toilet rooms, at no cost to employees. This includes male, female, and non-gendered toilet rooms. To learn more, contact Sherrard Kuzz LLP.

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Fixed-Term Agreements Are Not One Size Fits All

A fixed-term employment contract may appear attractive to an employer because it provides flexibility to respond to fluctuating operational needs and creates cost certainty. However, the risks to an employer associated with a fixed-term contract can be considerable, particularly if an employer uses successive fixed-term contracts with an employee or terminates the employment relationship before the expiry of the fixed-term.

The reality is, in most cases, a fixed-term contract provides no greater protection to an employer than a well drafted contract for an indefinite term that includes an enforceable termination clause. As such, we often encourage clients to rethink their desire for a fixed-term contract.

Successive fixed-term contracts – not as advertised

If a fixed-term contract is properly drafted and executed, when it expires an employer is not obligated to provide notice of termination or pay in lieu, unless expressly required by statute.[1] The contract simply ends.

However, reality is often different from theory. For example, if an employer and employee enter into a series of successive fixed-term contracts (as opposed to a single contract for an indefinite term), and one of the fixed-term contracts is allowed to lapse by even a day before a new contract is signed, this gap can potentially void the entire series of contracts converting them into a single contract of continuous employment under the common law. Similarly, in some circumstances, courts have been willing to void a series of fixed-term contracts that span a number of years where it was clear to the court the arrangement was more akin to a single contract for an indefinite term.

Two ways to avoid this risk are: i. rather than a fixed-term contract, use a contract for an indefinite term with an enforceable termination clause; or, ii. ensure administrative protocols are in place so there are no gaps between successive fixed-term contracts (easier said than done).

An "early termination clause" is a must

It is important to consider an early termination clause for any fixed-term contract.

Generally, an employee on a fixed-term contract without an early termination clause is entitled to be paid the balance of the contract if employment terminates prior to the expiry of the term. Courts have also held that an employee has no duty to mitigate in this context, meaning the employee has no obligation to take reasonable steps to find replacement employment income which would reduce the amount of damages owed by the former employer for breaching the fixed-term contract. For example, in the absence of an enforceable early termination clause, an employee with a two-year fixed-term contract who is let go six months into the term, will be entitled to a pay-out equal to the amount the employee would have earned over the remaining 18 months. By contrast, an early termination clause might limit termination entitlements to a lesser amount agreed to by the parties, or even to employment standards minimums which, in every Canadian jurisdiction, are measured in weeks, not months.

Employee versus independent contractor – an important distinction

In a recent decision of the Court of Appeal for Ontario, the court addressed two issues: i. the damages owed to an independent contractor (as opposed to an employee) when a fixed-term contract is terminated prior to its expiry; and ii. whether an independent contractor has a duty to mitigate damages.[2]

The court held that, as with an employee, absent an early termination clause, an independent contractor is entitled to the balance owning on the term. However, unlike an employee, an independent contractor has a duty to mitigate damages because an independent contractor is not dependent on an employer to the same extent:

> The trial judge erred by conflating the situation of independent contractors with that of employees working under fixed-term contracts…this court has never held that independent contractors do not have a duty to mitigate following breach of a fixed-term contract.
>
> A duty to mitigate arises when a contract is breached, including contracts with independent contractors. Of course, the terms of a contract may provide otherwise. However, nothing in this case takes it outside the normal circumstances in which mitigation is required. For example, the respondent was not in an exclusive, employee-like relationship with the appellants, nor was he dependent on the appellants; the terms of the contract permitted the respondent to perform services for other parties.

This is welcome clarification from the Court of Appeal, and also a reminder that a court will consider the actual characteristics of a workplace arrangement, including the level of exclusivity, not merely the label parties attach to it.

The court also reiterated that the burden to establish an independent contractor has failed to mitigate rests with the company.

Lessons for employers

As noted at the outset, generally speaking, a fixed-term contract provides no greater protection to an employer than a well drafted contract for an indefinite period. Even for a short-term employee or independent contractor, a properly drafted contract that limits entitlements on termination can provide the same level of flexibility and cost certainty at the end of the relationship.

For these reasons, we often encourage clients to rethink their desire for a fixed-term contract. That said, if a fixed-term contract is appropriate for the circumstances, we work with our clients to draft an enforceable contract that protects their interests and minimizes risk to the extent possible.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com

[1] For example, under the Ontario *Employment Standards Act, 2000* an employee will still be entitled to statutory notice of termination, or pay in lieu, if the term of the fixed-term contract is more than twelve months.

[2] *Monterosso v Metro Freightliner Hamilton Inc.*, 2023 ONCA 413 [*Monterosso*]

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

2023 Year in Review... What to Expect in 2024

2023 ushered in many important changes to the employment and labour landscape in Ontario and across Canada. Join us as we discuss how these changes impact employers. Topics include:

1. **Legislative Update**
   - Licensing requirements for temporary help agencies and recruiters in Ontario.
   - Cross-Canada update on key employment-related legislative amendments.

2. **Labour Law Update**
   - Update on Bill 124 and other wage restraint legislation and related case law.
   - Recent COVID-19 decisions (mandatory vaccination, religious exemptions).

3. **Human Rights Update**
   - The role of unconscious bias in race-based discrimination cases.
   - Family status discrimination update.
   - Recent case law on workplace investigations.

4. **Trends in Employment and Independent Contractor Agreements**
   - Enforceability of termination provisions.
   - Independent contractors and the duty to mitigate.

DATE: **December 6, 2023, 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
REGISTER: **Here by November 27, 2023.**

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