Reaching Out

Reaching Out – Tenth Edition

Date: March 10, 2016

Dear Friends,

With winter winding down, although not yet completely over, it is time to provide the 2016 Winter Edition of *Reaching Out*. In it, we discuss legal developments since our last edition that you will want to know about.

Carolyn Kay and Stephanie Jeronimo of our Toronto office have provided an update on the highly anticipated decision from the Pay Equity Hearings Tribunal addressing an issue for employers using the proxy method of comparison and maintaining pay equity obligations.

The Ontario government recently tabled its 2016 Budget and the corresponding Budget Bill. It contains initiatives that will be of interest to employers and we have included a short summary of some of the key proposals.

Lydia Bay, who currently practises in our Toronto office but who will be moving to our Kitchener-Waterloo office on August 1, 2016, has provided an update on Bill 132 – part of the Ontario government's Action Plan to Stop Sexual Harassment and Violence – which passed on March 8, 2016. Bill 132 will almost certainly require updates and amendments to workplace harassment policies.

Finally, we have included a short checklist to assist you in developing enforceable employment contracts that can be used to protect your interests and minimize your liability if you have to terminate an employee's employment.

As always, we hope that you find this newsletter informative.

Michael S. Smyth

Editor

In this Issue:

PAY EQUITY HEARINGS TRIBUNAL CLARIFIES MAINTENANCE OBLIGATIONS FOR EMPLOYERS UTILIZING THE PROXY METHOD

By: Carolyn L. Kay **and** Stephanie N. Jeronimo

In our May 25, 2015 edition of *Reaching Out* we discussed the proxy method of achieving pay equity and advised you of a decision pending before the Ontario Pay Equity Hearings Tribunal (the "Tribunal") that dealt with the issue.

The Tribunal recently issued this long-awaited decision, Ontario Nurses' Association v Participating Nursing Homes *("Nursing Homes")*.

At issue in this case was the Unions' assertion that in order to maintain pay equity using the proxy method, employers were required to return to their proxy employer to obtain up-to-date information, including job rates, with respect to the job classes used to develop the original pay equity plan. The Tribunal rejected that argument but confirmed that employers covered by the proxy methodology are nevertheless required to maintain pay equity once they had achieved pay equity.

ACHIEVING PAY EQUITY UNDER THE PROXY METHOD

For broader public sector employers which did not have sufficient male job classes to allow them to use the job-to-job or proportional value methods of comparison, such as social service agencies, the *Pay Equity Act*, (the "Act"), when it was amended in 1993, required the use of the proxy method of comparison.

Affected employers were required to obtain an order from the Pay Equity Commission declaring them to be a "seeking employer". This allowed them to obtain information from a proxy employer (typically a hospital or municipality) about job rates for job classes in their organization that were similar to key female job classes of the seeking employer.

Pay equity target rates were set for the female job classes in the organization using the proportional value method of comparison first, comparing the key female job classes to the similar job classes from the proxy employer and then, comparing all of the other female job classes in the organization to the key female job classes. The proportional value methodology set the relationship

between the value of the job classes and the compensation or job rates to be paid for those values.

For the purposes of achieving pay equity, the Act required seeking employers to spend 1% of previous years' payroll towards the achievement of pay equity, ensuring that the female job classes with the lowest value received a greater adjustment than other female job classes (even if only by one cent). Pay equity was achieved when the job classes in the organization were being paid their appropriate pay equity target rates.

For many employers covered by the proxy method, pay equity was not achieved for years following 1994, and, in some cases, pay equity has still not been achieved. For those still struggling to achieve pay equity, the recent decision of the Tribunal has no impact on their current obligations and liabilities.

For those who were, however, successful in achieving pay equity, the Tribunal has confirmed that employers covered by the proxy method are thereafter required to maintain pay equity.

MAINTAINING PAY EQUITY UTILIZING THE PROXY METHOD

In *Nursing Homes*, the Unions argued that the Act requires ongoing comparisons between the compensation of the key female job class(es) of the seeking employer and the female job classes of the proxy employer. The Unions further argued that if the Act did not require maintenance based on ongoing comparisons with the proxy employer, the Act was in violation of the *Charter*.

The Employers and the Province of Ontario, an intervenor in the case, argued that the Act contemplated a one-time only comparison with the proxy establishment rates in 1994 and that maintenance ought to be based solely on internal comparisons within the seeking employer's own establishment.

The Tribunal agreed with the Employers and the Province that the Act does **not** require seeking employers to continually compare themselves with the proxy employer. Pay equity is an internal exercise based on comparisons between job classes *within* an establishment.

Essentially, the Tribunal confirmed that the obligation to maintain pay equity requires maintenance of the relationship between the value of a job class to the employer and the compensation that the employer attaches to that value.

In addition, the Tribunal dismissed the Unions' *Charter* arguments, as well as the Unions' argument that changed job duties and responsibilities constituted "changed circumstances" that would render the original plan inappropriate. The Tribunal noted that changes in job duties and responsibilities are maintenance issues that must be monitored by employers.

IMPACT ON EMPLOYERS COVERED BY THE PROXY METHOD

As helpful as the decision is in confirming what is **not** required to maintain pay equity, the fact remains that any legal liabilities that employers currently have for failing to achieve and maintain pay equity remain exactly as they were before, and now after, the decision.

(Adapted from our *FTR Now* of March 7, 2016, “Pay Equity Hearings Tribunal Clarifies Maintenance Obligations for Employers Utilizing the Proxy Method”)

HIGHLIGHTS FROM THE ONTARIO BUDGET 2016

On February 25, 2016, the Ontario government tabled its 2016 Budget “Jobs for Today and Tomorrow” (“Budget”) and the corresponding Budget Bill, Bill 173, *Jobs for Today and Tomorrow Act (Budget Measures), 2016* (“Bill 173”).

Many topics addressed in the Budget are updates of the progress made on prior commitments made of government. Highlights related to pension and benefits include:

- confirmation of the Ontario Retirement Pension Plan contribution rate starting January 1, 2018 for Wave 1 employers
- updates about progress on the review of solvency funding for single employer defined benefit pension plans, the timing for the extension of existing temporary solvency funding relief measures, the timing for final pension advisory committees regulations under the *Pension Benefits Act*, progress on target benefit plan consultations and the implementation of pooled registered pension plans
- changes to the Ontario Drug Benefit Plan and harmonization of group benefits in the education sector.

The government has also announced that it will develop a strategic plan aimed at renewing the Ontario Public Service and, as well, will develop sector-specific executive compensation frameworks.

Other initiatives which have the potential to affect Ontario employers are discussed below.

CHANGING WORKPLACES REVIEW

In 2015, the government initiated a review of the changing nature of Ontario workplaces with a view to determining whether any amendments might be needed to the *Employment Standards Act, 2000* (“ESA”) or the *Labour Relations Act, 1995*. The focus of the review was on, among other things, non-standard working relationships, accelerating technological change and increasing workplace diversity. Two government-appointed Special Advisors have conducted public consultations and commissioned research. Among other subjects, the government has asked the Advisors to consider the personal emergency leave provisions of the ESA and their impact on business.

It is anticipated an interim report will be released in March 2016 at which time employers should have an opportunity for comment. A final report, together with recommendations, is expected in the summer of 2016.

GENDER WAGE GAP STRATEGY

The government created a Gender Wage Gap Steering Committee in April 2015 to consider, among other things, the factors causing Ontario's gender wage gap and to assess the impact of government actions, business practices and other factors on that gap. One mandate of the Committee was to consider how government, businesses, labour and other organizations can work together to deal with the systemic barriers confronting women.

The Committee was asked also to consider whether provincial legislation, such as the *Human Rights Code*, the *Pay Equity Ac*t and the ESA, adequately deals with the gender wage gap. However, the Committee was asked not to propose any legislative amendments. The Budget states the Committee is due to make its recommendations in May 2016.

THE WSIB UNFUNDED LIABILITY

The Budget reports on steps being taken by the WSIB to reduce costs and to retire its unfunded liability by 2022. The WSIB estimates that removal of the unfunded liability component of employers' premium rates will result in significant annual premium reductions in the future.

CHANGES TO THE ONTARIO COLLEGE OF TRADES

The Budget states that the government will bring forward legislative changes to strengthen the Ontario College of Trades in response to recommendations received from Tony Dean. It will also work with the College of Trades to implement recommendations to improve the College's processes, which include reviewing how trades are classified based on the criterion of risk of harm, and ensuring that the scopes of practice of the trades are consistent.

EMPLOYMENT STRATEGY FOR PERSONS WITH DISABILITIES

The government has announced it will develop a provincial employment strategy for persons with disabilities that will, among other things, involve employers with a view to breaking down employment barriers for persons with disabilities and promoting inclusive workplaces. The government will create the Partnership Council on Employment Opportunities for People with Disabilities to assist with this strategy.

ANTI-RACISM DIRECTORATE

The government will create a Directorate to address issues of racism in Ontario. Among other

things, the Directorate will work with business partners and others to increase public awareness of racism. It will also review government policies, programs and services from an anti-racism perspective.

(Adapted from our *FTR Now* of February 29, 2016, “Ontario Budget 2016”)

BILL 132: AN UPDATE ON ONTARIO’S SEXUAL VIOLENCE AND HARASSMENT ACTION PLAN

By: Lydia Bay

In our May 25 2015 Edition of *Reaching Out*, we discussed the Ontario government’s initiative to take action against sexual violence and harassment: “It’s Never Okay: An Action Plan to Stop Sexual Harassment and Violence” (the “Action Plan”). The Action Plan focused on raising awareness about sexual violence, discrimination and harassment. In this issue, we provide an update on an important piece of legislation flowing from the Action Plan.

The government tabled Bill 132, Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016 on October 27, 2015. On March 8, 2016, coinciding with International Women’s Day, Bill 132 was passed by the Ontario government. It amends six government acts in order to improve support for those affected by these issues and to protect students and workers from the threat of sexual violence and harassment. Of particular importance to employers are the amendments to the *Occupational Health and Safety Act (“OHSA”)*.

The *OHSA* has been amended to include the following definition of workplace sexual harassment:

Engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably be known to be unwelcome, or

Making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

The definition of ‘workplace harassment’ has also been expanded to include ‘workplace sexual harassment’, meaning that every reference to ‘workplace harassment’ throughout the *OHSA* now also refers to ‘workplace sexual harassment’.

Currently, the *OHSA* only requires that the employer provide a worker with information and instruction with respect to the contents of a workplace harassment policy and program. These amendments impose greater duties on an employer with respect to workplace harassment,

including:

- all employers must have a policy and program that includes workplace sexual harassment;
- the program must be in writing and must be developed and maintained in consultation with a joint health and safety committee or health and safety representative, if any;
- employers must ensure that an investigation is conducted into incidents and complaints of workplace harassment (including sexual harassment) and must inform the parties of the results of the investigation and any corrective action taken; and,
- a Ministry of Labour inspector may order that an external, impartial third party investigate a complaint and prepare a report, at the employers' expense.

Bill 132 also broadens and clarifies employers' obligations with respect to their policies regarding workplace harassment. Section 32.0.6 of the *OHSA* requires that an employer develop and maintain a program to implement a policy with respect to workplace harassment. Bill 132 expands this section such that an employer's policy must:

- include measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser;
- set out how incidents or complaints of workplace harassment will be investigated and dealt with;
- set out how information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless it is necessary for the purposes of investigating the complaint, taking corrective action or is otherwise required by law; and
- set out how a worker who alleges workplace harassment and the alleged harasser will be informed of the results of the investigation and if any corrective action has been or will be taken.

Bill 132 received Royal Assent on March 8, 2016. The *OHSA* amendments will come into force six months after Royal Assent, or September 8, 2016. It is important to be prepared for Bill 132. The changes to the definition of workplace harassment and the increased obligations on employers will likely require amendments and updates to current workplace harassment policies.

PRACTICAL TIPS ON DRAFTING AN EMPLOYMENT CONTRACT

By: Michael S. Smyth

Written employment contracts can help manage employee expectations and reduce the possibility of misunderstandings, disputes and litigation by providing clarity and certainty for both employers and employees. Accordingly, we thought it would be helpful to revisit the issue of written employment contracts for use with non-union employees.

Although using a written employment contract is an important first step in managing liability, it is essential to recognize that simply reusing an existing contract template may create a number of legal headaches in the future. Updating and tailoring employment contracts appropriately prior to hiring employees, and even periodically refreshing any template contracts, is an upfront investment that can pay dividends for years to come.

There are a number of key considerations that employers should bear in mind to minimize the risk that an employment contract is found unenforceable and to appropriately protect the employer's interests:

- For new employees, employment contracts must be signed prior to the commencement of work. When an employee signs a contract at the time of hire, the consideration the employee receives for agreeing to the contract's terms is the promise of employment.
- Do not ask an employee to sign an employment contract after the employee has already started working. A contract signed after employment starts will be unenforceable unless the employer offers and provides the employee with some additional consideration, such as a signing bonus or additional vacation entitlement in exchange for signing the contract.
- Provide a reasonable opportunity for the employee to review the contract before signing it and to obtain legal advice if he or she chooses to do so.
- Expressly exclude the application of the inducement doctrine by using language in the employee's employment contract such as:*Your employment will commence on [date] for all purposes. You are a new employee of [Employer name] and acknowledge that we have not lured you or used any inducements to draw you from a previous employer. No prior periods of service with any other entity will be recognized by the [Employer name] (except and only to the extent required by applicable employment standards legislation).*
- If the candidate **was** actually induced to leave secure employment, the wording of the draft clause above should be revised to essentially contract out of any requirement to recognize the employee's past service with previous employers.
- Ensure that a termination provision complies with minimum statutory requirements from the outset of the contract, and that it would not violate statutory minimums at some point in the future. Termination provisions must be carefully drafted such that as an employee acquires more service, the termination entitlements prescribed by the contract will always comply with minimum statutory requirements.
- Termination provisions should deal with benefit continuation and should not exclude accrual of vacation pay during the statutory notice period.
- Termination provisions should ensure that the employee will still be entitled to his or her statutory notice and severance pay, if applicable, where an employee is terminated for misconduct which may constitute just cause at common law but does not meet the more stringent test under the Ontario *Employment Standards Act, 2000* ("ESA") of "wilful misconduct, disobedience or wilful neglect of duty."
- Consider tailoring each clause to ensure compliance with the ESA and/or include "catch-all" language stating that in no circumstance will the employee receive less under the

contract than what is required by applicable employment standards legislation.

- Expressly state that the termination provision applies regardless of any change in the position held by the employee. Alternatively, enter into a new employment contract any time the employee will be assuming a new position involving an increase in status or rank. Such agreement should, of course, be entered into prior to the employee assuming the new position. The consideration for the new contract will be the promotion to the new position
- The obligation to mitigate and the resulting impact on the contractually agreed notice payments must be expressed in clear and specific language such that any notice or severance obligations will cease once a departed employee obtains alternate work, save and except for any minimum employment standards obligations. .
- A fixed term employment contract may be desirable where an employee is being hired for a particular project or for a defined period of time, such as to replace an employee on a disability or pregnancy/parental leave. There must be clear and unequivocal language conveying an intent to create a fixed term contract. A fixed term contract cannot exceed a term of nine years.
- Include early termination language in fixed term contracts.
- If the employee is being hired to fill a position which is not exempt from the hours of work and overtime pay provisions of the applicable employment standards legislation, ensure that the contract: (1) does not contemplate hours of work which exceed the statutory limit, without the required averaging permits or hours of work agreements in place; and (2) provides for overtime pay to be paid in accordance with the applicable statute.
- Ensure that the contract is clear as to which hours of work are covered by the base salary.
- If temporary layoffs are a possibility in an employer's operation, the employment contract should include language that permits the employer to temporarily layoff employees in accordance with the applicable employment standards legislation.

We hope that this provides you with some useful tips to consider when drafting or reviewing employment contracts. If you have further questions, please do not hesitate to reach out to your regular Hicks Morley lawyer.