School Board Update

A Legislative and Case Law Update for School Boards

Date: June 14, 2017

In this latest edition of our *School Board Update*, we provide you with a brief overview of the significant changes recently proposed by the Ontario government to the employment and labour laws in our province.

Nadine Zacks answers some practical questions employers are raising about their new workplace harassment obligations under the Bill 132 changes to the *Occupational Health and Safety Act*.

Shivani Chopra writes about a recent Ontario Court of Appeal case which found an employer was not vicariously liable for a sexual assault committed by an employee, as the action was only "coincidentally" connected with the workplace.

Finally, Dianne Jozefacki provides you with a summary of an arbitration award which concluded that the assignment of general supervisory duties to certain non-teaching staff without a principal or teacher being present was permissible and was not a violation of the *Education Act*.

Have a great summer and we will be bringing you more updates in the Fall.

Regards,

Amanda Lawrence-Patel and Dianne Jozefacki
Editors

1. Changes Are Coming to Ontario's Workplace Laws

On June 1, 2017, the Ontario government tabled Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*, legislation which, if passed, will make significant amendments to the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995* (LRA). On the same date, the Bill was referred to the Standing Committee on Finance and Economic Affairs. At this time, Committee hearings are scheduled throughout the summer.

The Bill was the government's legislative response to the Final Report of the Changing Workplaces Review, prepared by the Special Advisors to the government. Not all recommendations were adopted in the Bill.

For detailed information on Bill 148, please see our recent *FTR Nows*:

Ontario Proposes Legislative Overhaul of Labour Relations Act, 1995 – Are you Prepared? (June 5, 2017)

Bill 148 and the ESA – Changes Are On The Horizon For Ontario Employers (June 7, 2017)

2. Bill 132 – Nine Months Later

by Nadine Zacks

On September 8, 2016, the Bill 132 amendments to the *Occupational Health and Safety Act* (Act) came into force. These amendments revised and expanded the definition of "workplace harassment" in the Act to include "workplace sexual harassment" and introduced new requirements with respect to workplace harassment programs.

Specifically, the program must now, among other things:

- be developed and maintained in consultation with the joint health and safety committee (JHSC) or health and safety representative within the workplace
- include a reporting mechanism for incidents of workplace harassment, including a reporting mechanism for when the alleged harasser is the employer or supervisor
- ensure that all complaints and allegations are investigated
- set out how the complainant and respondent will be informed in writing of the results of the investigation and any corrective action taken.

The Ministry of Labour's dedicated workplace harassment inspectors have been making their rounds into workplaces to ensure compliance. We have set out below some of the most common questions we are receiving regarding the new provisions, and their impact upon school boards.

How much information do employers have to provide to the parties to a complaint following the investigation?

One of the most common questions that has arisen is what exactly must the employer tell the complainant about the "corrective action taken." As most employers are aware, there is a new requirement for an employer to inform the complainant and respondent in writing of the results of the investigation and any corrective action taken.

While this provision has not been litigated and the ultimate interpretation of the provisions remains to be seen, it is important to remember that the results of the investigation are not the same as the investigation report, and may simply be a summary of the result that the investigator reached.

With respect to corrective action, the amount of information provided will depend on the circumstances but should at a minimum indicate what steps the employer has taken or will take to prevent a similar incident of workplace harassment if workplace harassment was found. The amount of detail that must be provided to a complainant regarding disciplinary penalties imposed upon a respondent remains unknown, and most employers are providing minimal information at this point in time.

In the school board environment, where most employees are unionized, we further caution against providing specific information regarding discipline that has been imposed, as the discipline is always subject to collective agreement grievance and arbitration processes and, as a result, may subsequently change.

Do employers need to investigate complaints by former employees?

It is often the case that individuals who either complain of harassment or are aware that complaints are being made about them regarding harassment are no longer in the workplace by the time the complaint reaches an investigation stage. The question then arises regarding whether or not employers must still investigate these complaints.

If a complaint has been raised by a former employee but the alleged harasser remains in the workplace, prudent employers should still investigate, as the harassment may still be ongoing.

If the alleged harasser is no longer employed, but the alleged harassment occurred while they were still employed, the threshold for conducting an investigation will still have been met, as there was still an “incident” of workplace harassment. However, practically speaking, the “investigation appropriate in the circumstances” may look quite different than if the individual was still employed, since you may not be able to obtain the respondent’s version of events. In addition, there may not be any corrective action required, even if the allegations are substantiated.

Do I need to conduct a fulsome investigation for every complaint of workplace harassment, no matter how frivolous?

The Act now requires an employer ensure that “an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances.” This obligation is triggered not only when a worker makes a “formal” complaint pursuant to the policy or program, but also whenever an employer becomes aware of an incident of workplace harassment (for example, by viewing the incident or hearing about it from a third party).

However, the scope of that investigation may vary based on the type of complaint or incident. Some matters will not require a lengthy investigation (such as a complaint that does not, on its face, pertain to workplace harassment) whereas other situations may necessitate a complex investigation. It will depend on the circumstances. What is clear, however, is that some form of “investigation” by the employer is required.

How does the new language on confidentiality impact my investigation and subsequent communications regarding the investigation?

The Act now requires a workplace harassment program to include express language which sets out “how information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless the disclosure is necessary for the purposes of investigating or taking corrective action with respect to the incident or complaint, or is otherwise required by law.”

In practice, this may mean that a report of the investigation cannot be provided to various workplace parties, since it may contain information about the investigation, and the disclosure of this information is not necessary for investigating or for corrective action.

Further, this may restrict what an employer can say to workplace parties around an ongoing or concluded investigation. Often, when investigations involve a number of individuals in a department or workplace, some form of communication may be sent out regarding the investigation. There are now further restrictions that employers must consider before engaging in this level of communication.

What’s next?

These amendments to the Act are still in their infancy, so we expect to see many of the above issues (and more) evolve over the next months and years as case law develops. Hicks Morley will continue to keep you informed of any developments that affect employers.

3. Case Studies

a. Sexual Assault: When is an Employer Vicariously Liable?

by Shivani Chopra

In a recent decision, Ivic v. Lakovic, the Ontario Court of Appeal dismissed a claim against a taxi company whose driver allegedly sexually assaulted the appellant. The Court found that the alleged acts were only coincidentally connected to the taxi company and the company did not confer any power on the driver over the appellant.

In its decision, the Court set out the principles of vicarious liability and reiterated that:

- most commonly, an employer is found vicariously liable for an employee's acts when: (a) those acts were committed in the course of the employee's employment duties; and (b) they inadvertently result in loss or damage to an innocent third party
- a "**wrong that is only coincidentally linked to the activity of the employer and duties of the employee cannot justify the imposition of vicarious liability on the employer** … the fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability." [emphasis added]

In other words, before a finding of vicarious liability can be made against an employer in a sexual assault claim against its employee, there must be a connection between what the employer was asking the employee to do and the assault.

In this instance, the Court found that the driver's actions were not related to the company's aims and that the company had rules that sought to prevent any physical contact with customers. The Court concluded that the company did not "materially" increase the risk of the appellant being assaulted by the driver by permitting him to drive the taxi; it agreed with the motion judge that the alleged assault was only "coincidentally linked to the activities" of the company.

This case is a reminder of the importance of implementing appropriate workplace policies that govern workplace conduct and prohibit improper or criminal conduct by employees. In our view, this reminder is particularly salient in the school board context given the inherent vulnerability of those who access a school board's services and the overarching responsibility school boards have to provide a safe work and learning environment. Accordingly, we encourage each of our school board clients to consider and revise their policies as necessary to ensure that all employees are advised of the necessity of maintaining appropriate professional boundaries with staff and students.

b. Non-Teaching Staff Can Conduct Supervisory Duties without Teacher or Principal Present

by Dianne Jozefacki

An arbitrator recently found that the assignment of general supervisory duties to non-teaching staff (other than school secretaries and custodial staff) without a principal or teacher being present was permissible and was not a violation of the *Education Act* (Act).

In *Niagara Catholic District School Board and Canadian Union of Public Employees, Local 1317* (24 April 2017, Randazzo), the Union brought a policy grievance asserting that by permitting the assignment of general supervisory duties to non-teaching staff (particularly Educational Assistants or EAs), the Niagara Catholic District School Board (School Board) had violated the Collective Agreement and applicable policies, and the Act and its regulations.

Among other things, the Union argued that the Act and its supporting regulations only permitted a principal to delegate legislated supervisory duties to vice-principals and teachers; there was no express authority to delegate those duties to Teachers' Assistants[1]. While the Act contemplates Teachers' Assistants "*assisting* teachers and others," it did not contemplate they would play a significant supervisory role where a teacher or principal was not present. Moreover, it argued that only principals and teachers had authority to discipline, which was a fundamental act of supervision.

The School Board countered that nothing in the Act or regulations limited the assignment of supervisory duties exclusively to teachers, nor was there a limitation which would mandate that teachers be present at all times during general supervision. It referred to Regulation 298, which states that a principal *shall provide for* the supervision of students and argued that there was no legislative provision which mandated how that supervision would be provided, thereby giving discretion to the principal to assign supervision to a teacher, an EA or a combination of both.

Arbitrator Randazzo engaged in a detailed statutory analysis and dismissed the grievance. Among other things, he made the

following findings:

- During collective bargaining in 2008, the parties entered into Letters of Understanding which in part increased the hours of EAs in response to a decrease in the supervisory hours of teachers. While not helpful in the statutory analysis, the Letters “demonstrate[d] that the parties contemplated an increased supervisory role for school board employees such as EAs.”
- Regulation 278/11, s. 15(5), requires EAs to assist with “student safety and support through supervision,” wording which supports the EAs’ potential role in general supervision
- Regulation 298, s. 11(3)(e), states a principal shall provide for the supervision of pupils. Regulation 298, s. 20(b) provides that a teacher shall carry out the supervisory duties assigned to the teacher by the principal. Specifically, s. 11(3)(e) “demonstrates a legislative intent permitting principals to assign general supervision duties to EA’s and more specifically it negates the interpretation that the legislature intended an implied exclusion prohibiting such an assignment.”
- “Discipline” does not fall under the “umbrella” of supervision, as the Act refers to those duties separately and does not equate them.

The Arbitrator concluded that assignment of supervisory duties to EAs during non-instructional times, without the presence of a teacher or principal, was not a violation of the Act.

This is a very helpful decision for school boards as the issue of supervision, including the extent and to whom it can be assigned is regularly a topic of discussion with staff and unions. This decision supports that principals may require non-teaching staff, such as EAs, to conduct supervisory duties without the presence of a teacher. This will provide flexibility to principals as they prepare and finalize the schedules of their staff.

[1] The term “Teachers’ Assistants” is used in the *Education Act* to define non-teaching staff assistant teachers and/or designated early childhood educators. It encompasses the position of Educational Assistant.
