

## LABOUR AND EMPLOYMENT NEWSLETTER

Summer 2011 Edition



Without much fanfare, the Ontario government introduced regulations that impose new disability and accessibility requirements on employers. The regulations will require new policies, training and changes that address the lifecycle of employment, from hiring and recruitment to performance management and return to work processes. On another note, an Ontario court has confirmed the importance of conducting a thorough investigation and awarded an employee damages for constructive dismissal after he was disciplined and offered alternative positions by his employer. Finally, we thought the one-year anniversary of the coming-into-force of Bill 168 would be an appropriate time to evaluate what has happened in the past year.

### **ONTARIO INTRODUCES NEW EMPLOYMENT REGULATION AND (NOT SO NEW) TRIBUNAL**

As we reported in the Spring 2011 Edition of Watershed LLP's newsletter, Ontario employers will be subject to new employment-related disability regulation over the coming months.

The regulation in question relates to the [Accessibility for Ontarians with Disabilities Act, 2005](#) (the "AODA"), legislation administered by the Ministry of Community and Social Services. The purpose of the AODA is to identify and remove "barriers" to accessibility in certain areas by January 1, 2025 and is to be achieved by regulating public and private sector organizations. The regulations, known as "standards", will cover five areas:

1. Customer service
2. Built environment (buildings and other structures)
3. Employment
4. Information and communications
5. Transportation.

The government originally planned to introduce five separate standards, and had begun that process by passing a regulation called the Customer Service Standard. However, the government changed course and has now enacted the [Integrated Accessibility Standards](#) that encompass three subject areas:

Employment, Transportation, and Information and Communications (the "IAS").

### **New Obligations for Employers**

#### *Content and Timing of Obligations*

The IAS recognizes different categories of employers, and imposes different requirements and deadlines for each category. Organizations are designated as either public or private, and defined as "Large" (more than 50 employees) or "Small" (fewer than 50 employees).

#### *Training*

Training on the requirements of the IAS and the *Human Rights Code* must be provided to:

- all employees and volunteers,
- all persons who participate in developing the organization's policies (this could include, for example, members of Boards of Directors),
- all "other persons who provide goods, services or facilities on behalf of the organization".

Training must be provided "as soon as practicable", beginning on January 1, 2015 for Large organizations, and January 1, 2016 for Small organizations. There are specific requirements for public sector organizations.

#### *Accessibility Policies and Accessibility Plans*

Accessibility policies govern how an employer achieves or will achieve accessibility. Large organizations must establish accessibility policies by January 1, 2014, while Small organizations have until January 1, 2015.

Large organizations have until January 1, 2014 to establish "accessibility plans" that outline the organizations' strategy to "prevent and remove barriers and meet its requirements" under the IAS.

Designated public sector organizations have earlier deadlines for implementing policies and establishing

accessibility plans.

#### *Specific Employment Standards*

Large organizations must comply with the specific employment standards by January 1, 2016, and by January 1, 2017 for Small organizations. Employers must do the following<sup>1</sup>:

#### Recruitment

- Notify employees and the public about availability of accommodation for applicants with disabilities in its recruitment process,
- Notify job applicants selected to participate in an assessment or selection process that accommodations are available upon request in relation to materials or processes to be used.

#### Hiring

- When making offers of employment, employers must notify the successful applicant of its policies for accommodating employees with disabilities.

#### During Employment

- Develop and implement a written process for the development of "documented individual accommodation plans" ("IAPs") for employees with disabilities. The IAPs must include prescribed elements, including requests for evaluation by an outside medical expert at the employer's expense, participation of bargaining agent, and steps taken to protect privacy of personal information.
- Except for Small employers, develop and implement a return to work process for employees who require disability-related accommodations to return to work [Note: this requirement does not displace other return to work obligations such as

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<sup>1</sup> This list is a summary of the key requirements. For an exhaustive list of requirements, see the complete text of Part II of the IAS.

those under the *Workplace Safety and Insurance Act* or *Employment Standards Act, 2000*].

- “Take into account” the accessibility needs of employees with disabilities and IAPs when using a performance management process.
- “Take into account” accessibility needs and IAPs when providing “career development and advancement”, as defined in the IAS, to employees. [Note: the definition of “career development and enhancement” is broad and includes providing additional responsibilities and transfers].
- Where “redeployment”, as defined in the IAS, is used, an employer must “take into account” accessibility needs of employees and IAPs. [Note: the definition of “redeployment” includes reassignment to other departments or jobs as an alternative to a layoff when a job or department has been eliminated].
- Provide individualized Workplace Emergency Response information to employees who have a disability.
- Inform its employees of its policies to support employees with disabilities, including policies on the “provision of job accommodations that take into account an employee’s accessibility needs due to a disability”, and any changes in such policies.
- Where an employee with a disability requests it, every employer must consult with the employee to provide or arrange for the provision of suitable accessible formats and communication supports for information needed to perform the job, or for information that is generally available to employees in the workplace.

### *Compliance and Appeals*

The AODA provides for administrative penalties of up to \$100,000 for non-compliance. The IAS prescribes how the amount of such penalty will be determined. Three factors will be considered:

- whether the contravention is “minor” (contraventions of an administrative requirement), “moderate” (contraventions of a requirement for organizational preparedness) and “major” (contraventions of a “priority requirement”, including any that, “may pose a health and safety risk to a person with disabilities”),
- the organization’s history of contraventions, and
- whether the organization is an individual or corporation.

Appeals concerning the AODA and its regulations will be heard by the [License Appeals Tribunal](#) (the “LAT”).

### **Interpreting the New Obligations**

The IAS poses many challenges for employers. Not only are employers required to establish policies and, in some cases, accessibility plans, but employee training will also be required. Further, there are obligations that by their nature require an individualized response to particular employees. Establishing and uniformly applying a generic policy will not be sufficient.

The wording of the IAS makes it difficult to predict how employers will, on a case-by-case basis, meet the employment standards. For example, it is not immediately apparent how employers will satisfy an obligation to “take into account” various factors such as “accessibility needs” of employees when applying performance management or when implementing organizational change such as transfers. This language is different from the language known in the [Human Rights Code](#) context, such as “duty to accommodate” and “undue hardship.”

### **Interaction with Existing Employer Obligations**

The interplay between the IAS and other disability and employment legislation is not yet known. The IAS specifically provides that its requirements are “not a replacement or substitution for the requirements established under the *Human Rights Code*” nor do they “limit any obligations owed to persons with disabilities under any other legislation.”

This means that employers will remain subject to other legislation, decision-making bodies and processes including grievance arbitration, [Ministry of Labour](#) claims, the [Workplace Safety Insurance Board](#) and its [Appeal Tribunal](#), the [Human Rights Tribunal](#), as well as civil litigation before the courts. It is not known how the [License Appeals Tribunal](#) will be integrated with existing employment-related legislation and decision-makers.

### **Assistance for Employers**

Watershed LLP has extensive experience advising clients in a broad range of disability management issues and has been tracking this legislation closely. We are available to provide advice and training to employers in anticipation of the new regulation coming-into-force. Stay tuned for training opportunities, or contact us to discuss custom on-site training for your employees, volunteers and Boards of Directors.

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### **INCOMPLETE WORKPLACE INVESTIGATION LEADS TO SUCCESSFUL CONSTRUCTIVE DISMISSAL CLAIM**

In a recent trial decision, [Chandran v. National Bank](#) (2011 ONSC 777), a senior manager with 18 years service and age 41 at the time of dismissal was awarded damages for constructive dismissal. The facts surrounding his claim illustrate the need for employers to think carefully before investigating complaints and ultimately transferring an employee as a result of such investigation.

The employer, a bank, conducted an employee survey at a particular branch seen to have low morale and poor performance relative to others. A bank employee conducted interviews with branch employees and subsequently reported to management that nine of eleven employees made “unsolicited” comments against the manager, the plaintiff Chandran, and that he embarrassed employees and engaged in bullying.

As a result of the investigation, the bank decided to remove Chandran’s supervisory duties and began

exploring transfer opportunities within the bank. Before communicating this decision, the bank’s management representative met with Chandran to hear his side of the story. Chandran was told about general allegations against him.

At trial, Chandran testified that he was shocked and asked for the substance of the allegations or examples so he could defend himself. His request was denied, and the bank did not provide further information. That was the extent of the bank’s investigation, and the basis upon which it issued a disciplinary letter and offered two non-supervisory transfer positions. Chandran to a non-supervisory position. Chandran took issue with the conclusion that he was engaged in discipline-worthy conduct, and refused to accept the transfer. He commenced a claim for constructive dismissal.

The court was asked to decide whether the imposition of the discipline in combination with the unilateral removal of Chandran from his position is constructive dismissal.

The court found in favour of Chandran, noting that a reasonable person in similar circumstances would lose trust and faith in his employer. The bank reached serious findings of misconduct against Chandran, imposed discipline and mandatory transfer to lesser alternate positions was a fundamental breach of the employment context.

The bank’s alternative argument, failure to mitigate damages by staying in the transfer position, was rejected. The court concluded that having been issued serious discipline and forced to accept two lesser positions would be humiliating and embarrassing for Chandran, and he did not have a positive duty to accept them. Chandran was awarded fourteen months’ reasonable notice, which was the actual length of time it took him to find new employment.

This case highlights the significance that an incomplete investigation such as an informal employee survey can have on an employment relationship. Where an employer engages in a survey or investigation of some form, and reaches a conclusion about an employee, careful thought should be given to whether it is

necessary to conduct a complete and thorough workplace investigation. In the absence of a process that informs an employee of the allegations and provides a meaningful opportunity to respond, the imposition of change or discipline could leave an employer vulnerable to a constructive dismissal claim.

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### **BILL 168 - THE YEAR IN REVIEW**

Bill 168 came into force on June 15, 2010. Bill 168 amends the *Occupational Health and Safety Act* ("OHSA") to not only enhance protection against workplace violence, but to also address workplace harassment. It applies to all Ontario workplaces currently covered by the OHSA.

Before the enactment of Bill 168, workplace violence was treated no differently than other types of violent behaviour in our society. While it was possible to lay criminal charges under the *Criminal Code* or bring various types of civil claims against the offender as well as, in the case of violence in the workplace, the employer, there were no express statutory protection given to employees. Furthermore, criminal and civil claims were reactive, rather than preventive and did nothing to address workplace violence before it occurred.

Furthermore, while harassment in employment was protected under the *Human Rights Code* (the "Code"), the offending conduct had to be based on a so-called prohibited ground of discrimination under the Code to ground a claim under the Code. Such grounds include, for example, sex, sexual orientation, religion and place of origin. Insofar as the harassing or bullying behaviour was not based on a prohibited ground of discrimination listed in the Code a complainant was without a remedy under the Code and was left to pursue a claim in some other way. Sometimes these complaints escalated with tragic consequences.

### What is Workplace Violence?

Bill 168 defines workplace violence as:

- The exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to a worker
- An attempt to exercise physical force against a worker in a workplace that could cause physical injury to a worker
- A statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker

It is important to note that workplace violence that meets this definition, could also meet the definition under other legislation, including the *Criminal Code* and/or the Code.

Violence could be introduced into the workplace from a number of sources, including managers, supervisors, employees, customers, clients and visitors.

Examples of workplace violence include:

- threatening behavior such as shaking fists, destroying property or throwing objects,
- verbal or written threats that express an intent to inflict harm,
- physical attacks,
- any other act that would arouse fear in a reasonable person in the circumstances.

There has been much said in the press about domestic violence under Bill 168. Employers that are aware or ought reasonably that domestic violence is likely to expose an employee to physical harm in the workplace must take every precaution reasonable in the circumstances to protect employees. Accordingly,

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<sup>2</sup> For another recent discussion of the difficult issues involved in internal workplace investigations see [Disotell v. Kraft Canada Inc.](#)

employers must be able to recognize the signs of domestic violence in order to comply with this part of the OHSA.

#### What is Workplace Harassment?

As mentioned, the Code prohibits harassment in employment on a number of specified prohibited grounds. Bill 168 greatly expands the definition of workplace harassment under the OHSA by removing the precondition that the harassing behaviour be based on a prohibited ground under the Code.

The OHSA defines workplace harassment as engaging in a course of vexatious comment or conduct against a worker, in a workplace. Examples of workplace harassment include:

- bullying (including cyber-bullying)
- teasing
- leering or staring
- intimidating or offensive jokes or innuendos
- displaying or circulating offensive pictures or materials
- offensive or intimidating phone calls

#### What Does Bill 168 Require?

Bill 168 requires that the employer:

- Conduct a risk assessment for workplace violence that may arise due to the nature of the workplace, the type of work or conditions of work,
- Establish a violence and harassment prevention policies and develop programs to implement those policies,
- Provide education, instruction and supervision to employees on how to prevent violence,

- Regularly inspect the workplace and review the established programs to ensure standards are maintained.

It must not be forgotten that preventing workplace violence and harassment is an ongoing process and the objective should be continuous improvement. The only way to achieve this objective is by monitoring in a systematic way, whether the violence policy and program are working.

#### Ongoing Obligations

The OHSA requires that the employer review the policy regarding workplace violence as often as necessary but at least annually. The OSHA also requires the employer to reassess the risks of workplace violence as often as is necessary but at least annually.

The employer should review its assessment, policy and program if or when there is an actual occurrence of workplace violence to determine if additional measures are required to prevent workplace violence.

The program must not only be developed and implemented, but it must also be maintained which means that it must be reviewed on a periodic basis to ensure that it remains effective.

There are many circumstances that might require a review of the program including where the joint health and safety committee recommend that the program is lacking in some respect, where circumstances change (e.g. where the types of workers within the organization changes) and the risk assessment is no longer accurate or where an actual violent incident occurs and the program falls short in some respect.

Furthermore, every employer in Ontario, irrespective of the size, must prepare and review, at least annually, a policy on workplace violence. If six or more workers are regularly employed at a workplace, this policy must be in writing and posted in a conspicuous place in the workplace. If fewer than six workers are regularly employed at the workplace, the policy does not necessarily have to be written, but it is certainly recommended.

### Bill 168 Experience to Date?

When Bill 168 was first introduced, the Ministry commented in one of its guideline publications that “[i]t is not the role of ministry inspectors to resolve or mediate specific allegations of harassment in the workplace.” That being said, there is some anecdotal information about the actual role of inspectors over the past year. At a recent seminar for labour and employment lawyers, a Ministry of Labour representative provided some insight into complaints and enforcement relating to Bill 168 to date.

From an enforcement perspective, the Ministry reports that it has been “incredibly busy”. Workplace harassment is the #2 “reactive” category for workplace visits (we take “reactive” to mean responses to complaints, rather than Ministry-initiated workplace visits). Workplace harassment complaints outnumber workplace violence complaints by approximately 3:1. Most of the harassment complaints focus on allegations by employees against supervisors. This is perhaps not surprising given the amount of media attention given to harassment and “bullying” in the workplace.

In terms of orders, and despite the volume of harassment complaints, the Ministry’s largest area of activity is risk assessment orders. No charges have been laid in relation to Bill 168, but the Ministry expects charges are only a matter of time.

To date, there has been little litigation over Bill 168, except for a handful of appeals to the Ontario Labour Relations Board in the education sector. The Ministry expects its litigation activity will increase over time.

Bill 168 has also been considered by arbitrators in the context of dismissal grievances. For example, in a recent award<sup>3</sup>, Arbitrator Paul Craven dismissed the grievance of an employee dismissed for sexual harassment. When considering whether discharge was an appropriate penalty and whether it should, in the grievor’s circumstances, be substituted with a lesser penalty Arbitrator Craven said “...nor should I disregard the likely consequences for the morale of the

complainant and her co-workers, and for the Company’s ability to carry out its obligations with respect to workplace violence under the [OHSA]...were I to return the grievor to the workplace...”.

Not only are the requirements of Bill 168 mandatory and part of an employer’s duties under the OHSA, but having policies and programs in place to monitor and resolve workplace violence and harassment may assist an employer in defending a decision to dismiss an employee for violating workplace violence and harassment policies.

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<sup>3</sup> *Zehrs and UFCW, Local 1977*, 2010 CLB 33130

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