GROSMAN, GROSMAN & GALE LLP
BARRISTERS & SOLICITORS

Workplace Law E-ssentials

Monday, April 29, 2013

Beware of Unpaid Internships

However, as recently emphasized by the Ontario Ministry of Labour, the rules allowing for unpaid labour in Ontario are very limited and most "interns" are actually employees, entitled to the minimum employment standards under the *Employment Standards Act, 2000* (the "*ESA*"), including minimum wage.

Under the *ESA*, a person can work as an intern for no pay where an employer provides the intern with training in skills that are used by the employer's employees and **all 6** of the following conditions are met:

1. The training is similar to that which is given in a vocational school;

2. The training is for the benefit of the intern;

3. The employer derives little, if any, benefit from the activity of the intern while he or she is being trained;

4. The intern does not displace employees of the person providing the training;

5. The intern is not accorded a right to become an employee of the employer; and

6. The intern is advised that he or she will receive no pay for the time that he or she spends in training.

Another exception to the *ESA* which allows for unpaid internships is where the internship is part of a program approved by a college or university.

If neither of these exceptions are met, the worker in question is an employee, no matter the arrangement or understanding reached between the parties. It is important to remember that employers and employees are not allowed to contract out of the *ESA*, so any agreement that purports to classify someone as an unpaid intern that does not satisfy the conditions of the *ESA* is unenforceable. In those instances, the employee would be able to file a complaint with the Ministry of Labour or commence a civil action for unpaid wages, despite their agreement to work for free.

In Other News...

CONGRATULATIONS t
Norm Grosman on being awarded the Ontario Bar Association's inaugural Randall Echlin Mentorship award. This award was created to honour the late Justice Randall Echlin, former judge of the Ontario Superior Court of Justice. Norm will receive his award at a dinner ceremony on May 30, 2013 at the Westin Harbour Castle.

On May 8, 2013 Norm Grosman will be speaking for Federated Press Publications on the topic "Executive Employment Contracts".

On June 13, 2013 Mark Fletcher will be speaking at the Six Minute Employment Lawyer on the topic *R. v. Cole*, a Supreme Court of Canada decision on employee privacy rights.

On October 10, 2013 Jeff Hopkins will be speaking at the Lorman Educational Services "Employment Standards Act" seminar, on the topic "Employee vs. Independent Contractor".

Childcare Needs: Family Status and Human Rights Revisited

The January 2013 Federal Court of Canada decision in *Canada (Attorney General) v. Johnstone* upheld an earlier determination by the Canadian Human Rights Tribunal that an employee's childcare needs are captured by an employer's obligation to accommodate "family status" under the *Canadian Human Rights Act* ("the *Act*"). The

Act specifically prohibits discrimination on the basis of family status in matters relating to employment. The decision, which expands the scope of family status protection, is likely to be followed in provinces which have similar legislation including Ontario.

The Tribunal determined that the Canadian Border Services Agency ("CBSA") discriminated against Ms Fiona Johnstone when it refused her request to work a fixed day shift rather than rotating shiftwork in order to accommodate her childcare needs. Ms Johnstone had been working as a full-time border services officer on rotating shifts. Ms Johnstone made the request because she had been unable to arrange childcare that would allow her to work on rotating shifts. Her husband also worked shift work and therefore could not provide the necessary childcare. A full-time fixed day shift schedule would allow Ms Johnstone to arrange childcare for her children. However, CBSA policy limited fixed day shifts to part-time employment only. And, the complicate matters, when Ms Johnstone switched to part-time she was no longer eligible for benefits which were available to full time employees.

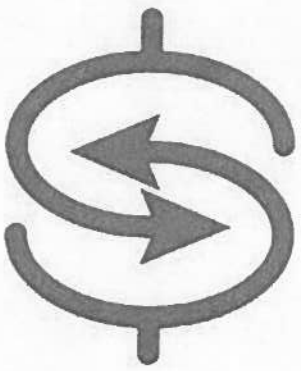
The CBSA was unsuccessful in defending its approach because it was not able to prove that its shiftwork policy was a *bona fide* occupational requirement or that it would have suffered undue hardship if it accommodated Ms Johnstone's childcare needs. The CBSA took the position that family obligations did not fall within family status because having children was a matter of personal choice.

Notably, the CBSA had a practice of accommodating other employees' childcare needs on religious and medical grounds. The CBSA also failed fully appreciate the context of her request. Her switch to part-time employment negatively impacted her compensation and CBSA's policy regarding employees seeking childcare arrangements was also not based on a legitimate business need rather; it was arbitrary and haphazardly applied.

The message is clear: Employers must actively attempt to understand and accommodate their employees' needs and be flexible unless it would objectively create undue hardship or constitutes a *bona fide* operational requirement.

This decision, which broadens the interpretation of family status, may also have larger implications. Such a decision could also extend human rights protections to those with parents or siblings who have significant care needs.

"Time Is Money": Human Rights Tribunal Orders Reinstatement Plus 9 Years Worth of Retroactive Compensation and General Damages



In what is likely one of the Ontario Human Rights Tribunal's ("the Tribunal") largest monetary awards ever, Ms Fair was awarded approximately $420,000 in lost wages (plus interest), adjustments for pension and reimbursement for health and insurance benefits. Moreover, the Tribunal awarded Ms Fair $30,000 in general damages as compensation for the injury to her dignity, feelings and self-respect.

In a prior decision, the Tribunal found that the School Board discriminated against Ms Fair based on disability contrary to the *Human Rights Code* when it failed to accommodate her disability-related needs starting in April 2003 and then by terminating her employment on July 9, 2004. This decision focused solely on the appropriate remedy or remedies, given the Tribunal's earlier finding on liability.

Ms Fair was employed by the School Board from October 24, 1988 to July 9, 2004. At the time of her termination, she held the position of Supervisor, Regulated Substances, Asbestos. In the Fall of 2001, Ms Fair developed a generalized anxiety disorder. Her disability was determined to be a reaction to the highly stressful nature of her job, and her fear that in making a mistake with respect to asbestos removal, she could be held personally liable under the *Occupational Health and Safety Act.*

Ms Fair received long-term disability benefits until April 2003, when she was assessed as being capable of gainful employment. From April 2003 to her termination date, the Tribunal found that the School Board failed to investigate possible forms of accommodation. On June 3, 2003, an Area Supervisor announced his resignation, a position for which the Tribunal found Ms Fair was qualified for and could have been offered, but was not. Further, the School Board advertised a Staff Development Supervisor position on June 26, 2003, which was in the same department Ms Fair had been volunteering in during her work hardening program. Ms Fair was

deemed to be qualified for the position given the School Board invited her for an interview, but did not offer her the position.

Ms Fair sought the remedy of reinstatement. The remedial objective of human rights legislation is to make the applicant "whole". In opposing reinstatement, the School Board argued that Ms Fair had not demonstrated that she was medically fit to return to either her former position or the other Supervisor positions, which the Tribunal rejected. The School Board also argued that it would be unfair to allow Ms Fair to "lie in the weeds" for years and then seek reinstatement, which was also rejected as Ms Fair had listed reinstatement when she filed her application with the (now former) Human Rights Commission in November 2004. In addressing the significant delay from 2004 to January 2009 (when Ms Fair filed a fresh application with the Tribunal), the Tribunal outlined how its Rules at the time encouraged those applicants with more complex cases to "stay" their applications until after the process was streamlined in mid-2008. Accordingly, the Tribunal held that the lengthy 9-year delay could not be attributable to Ms Fair and therefore she should not prejudiced by it.

The Tribunal found that reinstatement was the appropriate tool to make Ms Fair "whole" and place her back in the position she would have been in had the discrimination not occurred. The Tribunal referenced the Supreme Court of Canada decision *Alberta Union of Provincial Employees v. Lethbridge Community College* 2004 SCC 28, which stated, "as a general rule, where a grievor's collective agreement rights have been violated, reinstatement of the grievor to her previous position will normally be ordered. Departure from this position should only occur wither the arbitration board's findings reflect concerns that the employment relationship is no longer viable." In this case, the Tribunal felt there was no animosity between Ms Fair and the School Board which would impede the potential for a successful reinstatement, as Ms Fair testified that she held no ill-will towards the School Board. In terms of Ms Fair's specific reinstatement, the Tribunal found that had the School Board properly accommodated her in June 2003, she likely would have returned from her disability leave to either the Area Supervisor or Staff Development Supervisor position.

And, perhaps in an attempt to exonerate itself of any culpability associated with the delay, the Tribunal found that the delay had not been unreasonable, in light of the complexity of the issues, and because the passage of time "in and of itself was not sufficiently prejudicial" to the School Board to justify refusing reinstatement.

In assessing Ms Fair's request for damages for injury to dignity, feelings and self-respect, the Tribunal referenced an email she sent the School Board while she was seeking to return to work, which stated, "This entire process has been humiliating, degrading and very hurtful." The Tribunal found that Ms Fair's frustration with the School Board's clear reluctance to accommodate her was apparent and understandable.

While this decision may be far from over given the possibility (or likelihood) of judicial review, its significance should not be overlooked. The Tribunal has been consistently criticized, justifiably or not, for not awarding reinstatement when, as outlined above, the remedial objective of human rights legislation is to make the individual "whole", which arguably can only be accomplished through an award of reinstatement and lost wages. This award will likely not represent some type of watershed moment for the Tribunal given the special circumstances of the 9-year delay. It should however still serve as a wake-up call to employers not to discount or underestimate the power of human rights tribunals, given their ability to reinstate. Greater attention should be given to the potentially significant financial risk associated with the passage of time, something employers are typically not concerned with, or even often encourage. After all, as the saying goes, "time is money".

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