Canadian Employment Safety and Health Guide

August 2014
Number 407

Wolters Kluwer CCH

PRODUCT SPOTLIGHT

Did you know that the *Canadian Employment Safety and Health Guide* incorporates case annotations into the commentary, with links to case digests?

RUNNING A-FOWL OF OHS: A CAUTIONARY TALE FROM SASKATCHEWAN

— By Kit McGuinness. © Miller Thomson LLP. Reproduced with permission.

Occupational health and safety ("OHS") policy has been a hot topic in Saskatchewan as of late. Not only has the regime received a large overhaul under the new *Saskatchewan Employment Act*, but a recent news item has sparked hot debate within the province over governmental regulation of family farms.

On August 5, a provincial OHS officer arrived at a small family farm near Endeavour, Saskatchewan after receiving a complaint related to labour practices involving young persons. This particular family farm raises, butchers, and processes free-range chickens "from field to fork", and all members of the family and some of the neighbours kids have helped with these farming practices in the past. The processing facility at the farm is small and operated manually, unlike large industrialized facilities that are almost entirely mechanized.

While young farm workers in Saskatchewan do receive some legal exceptions (for example, farm children under the age of 16 in this province are allowed to drive a tractor), *The Occupational Health and Safety Regulations* explicitly forbids employers from allowing young persons under the age of 16 to work "in a production process in a meat, fish, or poultry processing plant." As such, the OHS officer determined that the farm was in violation of the law.

After the story broke, the Saskatchewan government stepped in with what Minister of Labour Relations and Workplace Safety Don Morgan called a "common sense" solution: children of the farm owners could continue working on the farm, including in the processing facility, however no other children under the age of 16 will be allowed to work within the processing facility. On August 8, the Minister said "We're going to treat this as an extension of the family farm. For the immediate family members, they don't require a permit or anything else. They can continue to work. What we've decided to do here is

just take a common sense approach and say this is part of a family farm operation. We're treating it as a family farm. We're going into harvest time and the message we want to get to everybody is rather than look at regulations, look at safety. Pay attention, use equipment carefully and wisely." He also stressed that OHS officials had looked into the safety record of the farming operation and had found it to be spotless.

While the family farm in question has termed the outcome to be 'win-win' for everyone, employers of all sizes must be aware of the provincial laws, including employment standards and OHS regulations, in operating their businesses. Don't count your chickens before they hatch — consult a labour and employment lawyer if you are worried about compliance under the new OHS regime in Saskatchewan.

HEALTH AND SAFETY FROM COAST TO COAST

Ontario's *Stronger Workplaces for a Stronger Economy Act, 2014*

On July 16, 2014, Ontario introduced Bill 18, the *Stronger Workplaces for a Stronger Economy Act, 2014*. Bill 18 is a combination of Bill 146, the *Stronger Workplaces for a Stronger Economy Act, 2013* (originally introduced on December 4, 2013), and Bill 165, the *Fair Minimum Wage Act* (originally introduced on February 25, 2014), both of which died on the order paper when the June 12, 2014 election was called.

Bill 18 contains five schedules amending five different Acts. If passed, Schedule 4 would amend the *Occupational Health and Safety Act* and Schedule 5 would amend the *Workplace Safety and Insurance Act, 1997*.

Occupational Health and Safety Act

Schedule 4 would amend the definition of "worker" under the *Occupational Health and Safety Act*. The current definition of worker is "a person who performs work or supplies services for monetary compensation . . .". Schedule 4 would amend the definition of worker to include the following unpaid individuals:

- a secondary school student performing work or services under a school board authorized work experience program;
- a person performing work or services under a college, university, or other post-secondary institution approved program;
- a person who receives training from an employer but is not an employee under section 1(2) of the *Employment Standards Act, 2000* as having met the "person receiving training" conditions; and
- any person who is prescribed by regulation.

Workplace Safety and Insurance Act, 1997

Schedule 5 would amend section 83 of the *Workplace Safety and Insurance Act, 1997* to make employers liable for the Workplace Safety and Insurance Board ("WSIB") costs of injured agency workers working for them. Under Bill 18, if a temporary help agency lends or hires out the services of a worker to another employer and the worker sustains an injury while performing work for the other employer, the WSIB must attribute the injury to the other employer. In addition, the amendments impose certain notice of injury requirements on the other employer if an injury to a worker necessitates health care or results in the worker not being able to earn full wages. An employer who fails to comply with the notice requirements must pay a prescribed fee.

REMINDER: SASKATCHEWAN SUMMARY OFFENCE TICKETS

Occupational health officers now have the power to issue on-the-spot tickets for violations of occupational health and safety legislation. Fines range from $250 to $1,000 depending on the offence. There are 12 ticketable offences, including, failing to use provided personal protective equipment ($250); failing to submit information requested by the director ($650); and failing to ensure that workers use personal protective equipment ($1,000). Tickets can be issued to employers, supervisors, contractors, workers, self-employed persons, suppliers, and/or owners. Summary offence ticketing came into effect on July 1, 2014.

WORTH NOTING

Alberta Workplace Injury Rates Hit Record Low

The latest statistics show a 20-year trend of improved workplace safety.

The rate of Alberta workers being hurt on the job dropped in 2013, according to information provided by the Workers' Compensation Board ("WCB"). In fact, the lost-time claim ("LTC") rate is now at an all-time recorded low.

In addition, the disabling injury rate ("DIR") dropped in some of Alberta's key sectors last year: construction; manufacturing; and oil and gas development. The DIR combines information on workers who could not work because of their injury or had their duties modified due to workplace injury or disease.

Despite safety improvements, there were 188 workplace fatalities in 2013. More than half of the fatalities resulted from occupational disease. In some cases, the worker may have been exposed to the disease decades ago.

While the rate of injury went down, the number of disabling injury claims rose slightly as Alberta's workforce grew by 2.9 per cent to 2.1 million.

WorkSafeBC Imposes Penalty and Claims Cost Levy Against Lakeland Mills Ltd.

WorkSafeBC has ordered Lakeland Mills Ltd. to pay $724,163.28 in penalties and levies after two workers died and 22 others were injured following an explosion and fire at a sawmill on April 23, 2012.

The WorkSafeBC incident report indicates that the mill's northeast corner exploded outward. A few seconds later another section erupted in flames. The explosion travelled east to west through the mill's operating level, destroying the mill, killing and injuring the workers. According to the report, dust was dispersed throughout the mill and in a high enough concentration to explode. Lakeland Mills Ltd. was found to be in violation of the *Workers Compensation Act* and the *Occupational Health and Safety Regulation* and ordered to pay a $97,500 administrative penalty and a $626,663.28 claims cost levy for violating the Act and the Regulation.

The WorkSafeBC incident report is available online at http://www.worksafebc.com/news_room/news_releases/assets/nr_14_04_14/IncidentInvestigationReport.pdf.

Q AND A

What Personal Protective Equipment (PPE) Is Required?

Personal protective equipment ("PPE") includes any device or clothing worn or carried by an individual to protect the individual from exposure to a known or potential hazard. Examples of PPE include:

- hard hats or caps
- safety glasses, goggles or shields (including welding masks)
- hearing protection (ear plugs or muffs)
- dust masks
- self-contained breathing apparatus
- protective vests
- gloves
- safety belts and lanyards
- protective coveralls (including biohazard or chemical hazard suits)

- alarm or alert devices
- safety boots (steel-toed/soled shoes).

In some instances, the use of PPE is prescribed by regulations. For example, sections 21 through 27 of Ontario's *Construction Projects Regulation* (O. Reg. 213/91) — regarding PPE — will apply to applicable workplaces.

In other instances, the use of PPE is covered by the general provision that requires employers to take every reasonable precaution to protect the health and safety of workers. This translates into a requirement to prescribe rules on the use of PPE and to enforce those rules. There is no specific requirement to supply the PPE necessary. Hence, many employers require employees to supply their own safety shoes or other protective equipment. However, in specialized circumstances the employer should supply the equipment. As well, under most collective agreements there is some provision for the issuing of PPE or a cost-sharing arrangement.

HEALTH AND SAFETY VIOLATIONS

Symtech Innovations Ltd. Fined $90,000 for Worker's Death

On July 30, 2014, Symtech Innovations Ltd., an Ontario construction business in the commercial and industrial sectors, was fined $90,000 after a worker died following a fall through a skylight.

On February 14, 2012, employees of Symtech were on a job site installing solar panels on the rooftop of an industrial building. The rooftop had a large surface area divided down the middle by a row of about 20 skylight openings that had their skylights in place. The skylights looked down into the building through to the main floor, approximately five metres below.

A worker employed by Symtech as its acting foreperson at the project site spoke with a co-worker, then turned and began walking toward the north end of the roof. After taking a few steps the worker slipped and reached out to brace the fall on a skylight. The skylight did not support the worker's weight and the worker fell through it to the floor below, a distance of about five metres. The worker was critically injured by the fall and subsequently died from the resulting injuries about a week later.

An investigation of the incident by the Ministry of Labour revealed that no guardrails or protective coverings were installed around or over any of the skylights on the rooftop as required by law.

Symtech Innovations Ltd. pleaded guilty to failing as an employer to install protective coverings over skylights located on the roof while work was proceeding. The company was fined $90,000 by Judge Geraldine N. Sparrow at the Ontario Court of Justice in Toronto. In addition to the fine, the Court imposed a 25 per cent victim fine surcharge.

Design Air Ltd. Fined $70,000 for Worker's Death

On August 11, 2014, Design Air Ltd., an Ontario heating, ventilation and air conditioning ("HVAC") company was fined $70,000 after a worker was fatally injured.

On April 16, 2012, a supervisor employed by Design Air Ltd. and an apprentice prepared to repair an HVAC unit at a residential home. The HVAC unit was located on top of a flat roof at the rear of the residence. The apprentice was sent up to the roof to look at the equipment while the supervisor performed other tasks. A short time later, the apprentice was found lying on the ground at the rear of the residence. The apprentice suffered fatal injuries as the result of the fall.

A Ministry of Labour investigation determined that the apprentice had fallen about nine metres and was not wearing any form of fall arrest equipment at the time of the fall.

Design Air Ltd. pleaded guilty to failing to take the reasonable precaution of ensuring that a worker was protected by a fall arrest system as required by law, and was fined $70,000. The fine was imposed by Justice of the Peace Sunny Ng. In addition to the fine, the Court imposed a 25 per cent victim fine surcharge.

RECENT CASES

Reprimands for Violation of Safety Protocols Not Discrimination

Human Rights Tribunal of Ontario, February 6, 2014

The applicant, Sfara, a carpenter, filed a grievance against his employer alleging bullying and harassment under the *Occupational Health and Safety Act*. An investigation was conducted and the grievance was denied. Sfara subsequently applied to the Human Rights Tribunal of Ontario ("HRTO") alleging discrimination. He alleged that his supervisor yelled at him about wearing proper safety equipment because he did not have his safety boots on. Sfara felt that the safety boots were not necessary. Following another incident, the supervisor gave him a letter about the need to wear appropriate safety equipment. In another incident, Sfara alleged that the supervisor berated him, called him stupid, and threatened him with being fired.

The application was dismissed. The HRTO does not have a general power to deal with allegations of unfairness. Discrimination generally involves an allegation of unfair treatment because of one or more of the prohibited grounds under the *Human Rights Code* ("Code") such as sex, race, disability, or family status. In the instant case, there was no link between the conduct of the supervisor and any prohibited ground under the Code. While there are many instances when Sfara believed he was unfairly singled out by his supervisor and unfairly reprimanded for violation of basic safety protocols, there was no cogent evidence to prove discrimination.

Sfara v. Toronto (City), 2014 CSHG ¶95,968

Employee's Termination was Reprisal

Ontario Labour Relations Board, June 17, 2014

The applicant, Sands, worked for an investment/marketing company. She tried to speak with a company manager about her concerns with aggressive clients and about having the company develop procedures to deal with matters such as violence and harassment. The manager refused to entertain the suggestions. Sands then contacted the Ministry of Labour and complained that she felt threatened in her work environment and that her employer had no policies to deal with her concerns. A Ministry inspector came to the workplace and ordered the employer to prepare a violence and harassment policy. The next day Sands' employment was terminated. Sands alleged that her termination was a reprisal contrary to section 50 of the *Occupational Health and Safety Act* ("Act").

The application was allowed. There was no doubt Sands had raised a health and safety concern. She had contacted the Ministry to inquire about her rights in the workplace because she felt threatened by disgruntled and aggressive clients. The Ontario Labour Relations Board ("OLRB") accepted that the situation constituted an unsafe workplace under the Act and that Sands had characterized it as such to the company manager. In addition, in the absence of an explanation from the employer (the employer did not attend the OLRB hearing), the OLRB was satisfied that at least part of the employer's reason for terminating Sands was that she had raised health and safety issues in the workplace. As such, Sands' termination was a reprisal under section 50 of the Act. Sands was entitled to damages in the amount of four weeks' wages.

Abigail C. de los Santos Sands v. Moneta Marketing Solutions Inc., 2014 CSHG ¶95,969

Worker Failed To Inform WSIB of Material Change In Circumstances

Ontario Court of Justice, May 21, 2014

This was the trial of the defendant, Ramgobin, charged with failing to inform the Workplace Safety and Insurance Board ("WSIB") of a material change in circumstances and two charges of making a false or misleading statement to the WSIB in connection with his claim for benefits. In April 2011, Ramgobin, a bartender at a restaurant, injured his right knee when he slipped and fell at work. He received loss of earning benefits from the WSIB. In progress reports and to his health professionals, Ramgobin indicated that he was unable to drive to and from work and unable to perform any productive work. However, surveillance video from August 2011 showed Ramgobin on several occasions driving to the

restaurant, carrying bags of groceries, walking without a limp, and serving customers for hours. Ramgobin maintained that he was not working at the restaurant after his injury, but was at his former place of work to socialize and help out for short periods of time.

Ramgobin was found guilty. There was overwhelming evidence showing that Ramgobin was performing, the majority, if not all, of the duties he used to do at the restaurant before his April 2011 injury. Ramgobin failed to fulfill his obligation to inform the WSIB about this material change. He knew or ought to have known his return to work was a material change that could affect his entitlement to WSIB benefits. His failure to inform the WSIB was presumed to be intentional and therefore wilful. In addition, Ramgobin's progress reports were false or misleading statements. He deliberately misled the doctors about his abilities. The Crown had proved beyond a reasonable doubt that there had been a material change in Ramgobin's circumstances and that Ramgobin had wilfully failed to inform the WSIB of such change in connection with his entitlement to benefits.

Ontario (Workplace Safety and Insurance Board) v. Ramgobin, 2014 CSHG ¶95,970

Worker's Action Against Executive Officer of Employer Could Proceed

Ontario Workplace Safety and Insurance Appeals Tribunal, May 22, 2014

A worker, Scott, brought an action against her employer, Atotech Canada Ltd. ("Atotech"), and Torcoletti, an executive officer of Atotech. Scott had a medical condition affecting her shoulders. Torcoletti manipulated and/or massaged Scott's neck without her consent. Torcoletti was known to be physically demonstrative and the human resources manager had spoken to Torcoletti on more than one occasion to warn him not to touch co-workers or customers except as necessary. Scott alleged that Torcoletti injured her neck. Atotech and Torcoletti applied to determine whether Scott's right of action was taken away. At issue was whether the *Workplace Safety and Insurance Act* ("WSIA") creates an absolute bar against an action by a worker against an executive officer of the worker's employer and, if it does not create an absolute bar, what is the standard determining whether a worker's right to sue an executive officer of the worker's employer should be removed.

The action against Atotech was barred by section 26 of the WSIA, but the action against Torcoletti could proceed. Section 26 of the WSIA does not create an absolute bar to an action against an employer or an executive officer of the employer for personal conduct. Scott's action against Atotech was barred by section 26 because she was in the course of her employment at the time of the alleged incident. With respect to the action against Torcoletti, the question was whether he was acting in an employment-related capacity in the conduct subject of the civil action. In the instant case, the neck manipulation or massage was not reasonably incidental to his role as an executive officer of the company. His actions were not condoned in the workplace as he had been instructed by the HR manager to refrain from making unnecessary physical contact with employees or clients. Furthermore, there was an element of intention in that Torcoletti's actions were not taken by mistake or accident. He deliberately placed his hands on Scott for the purpose of administering the massage or manipulation. Torcoletti was not acting in an employment-related capacity in regard to the conduct subject to the civil action. As such, Scott's right of action against him was not barred by the WSIA.

Decision No. 727/13, 2014 CSHG ¶95,971

Action Against Ministry of Labour For Failure To Enforce Workplace Safety Standards

Ontario Superior Court of Justice, June 13, 2014

Metron Construction Corporation was fined $750,000 for criminal negligence causing death (*R. v. Metron Construction Corporation*, 2012 ONCJ 506, 2012 CSHG ¶95,855; 2013 ONCA 541, 2013 CSHG ¶95,855). The charges arose from a December 2009 accident in which five workers fell 13 floors when a suspended work platform collapsed. Four workers were killed and the fifth was seriously injured. The injured worker, Dilshod Marupov (and other plaintiffs), commenced an action in negligence against the Ministry of Labour, Metron Construction Corp., and Swing 'N Scaff (the scaffolding company). In the action against the Ministry, Marupov alleged that the Ministry failed to enforce workplace safety standards; failed to properly train its employees to inspect the scaffolding and enforce the statutory safety

requirements; and hired employees who were incompetent and did not use the requisite care in inspecting the premises and the scaffolding. At examinations for discovery, the Ministry refused to answer questions regarding the education, training and experience of the Ministry's inspector assigned to the job site as well as his workload, on the basis that decisions about when and whether to inspect were policy decisions. The Ministry also refused to answer questions regarding pre-incident guidelines and changes in policy since the incident. The plaintiffs brought a motion to compel the Ministry to answer the questions.

The motion was allowed. The questions regarding the inspector's education, training, experience, and workload were relevant to the pleaded particulars of negligence. Core policy decisions of government are protected from tort actions, but governments can be liable where government agents are negligent in carrying out their duties. It is an open question, best left to the trial judge, whether discretionary decisions by inspectors as to when or whether to inspect are core policy decisions of the government or whether they are operational decisions of employees carrying out their legislative mandate to enforce safety under the *Occupational Health and Safety Act*. The plaintiffs were entitled to answers regarding pre-incident annual sector plans and policy manuals or other guideline documents. Questions regarding changes in policy since the incident were relevant to the issues of negligence and were to be answered.

Marupov v. Metron Construction Inc., 2014 CSHG ¶95,972

CANADIAN EMPLOYMENT SAFETY AND HEALTH GUIDE

Published monthly as the newsletter complement to the *Canadian Employment Safety and Health Guide* by Wolters Kluwer CCH.
For subscription information, contact your CCH Account Manager or call 1-800-268-4522 or 416-224-2248 (Toronto).

For Wolters Kluwer CCH

Farzana Wali, BA (Hons), LLB, Writer
Law & Business
416-224-2224, ext. 6222
email: Farzana.Wali@wolterskluwer.com

Rita Mason, LLB, Director of Editorial
Law & Business
416-228-6128
email: Rita.Mason@wolterskluwer.com

Andrew Ryan, Director of Marketing
Law & Business
416-228-6158
email: Andrew.Ryan@wolterskluwer.com

Notice: *This material does not constitute legal advice. Readers are urged to consult their professional advisers prior to acting on the basis of material in this newsletter.*

Wolters Kluwer Limited
300-90 Sheppard Avenue East
Toronto ON M2N 6X1
416 224 2248 · 1 800 268 4522 tel
416 224 2243 · 1 800 461 4131 fax
www.cch.ca