CANADIAN
Employment Law Today
A Carswellbusiness Publication ■ www.employmentlawtoday.com

CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS

ISSUE NO. 514 • JULY 16, 2008

No bad-faith or punitive damages for Keays

Honda only on the hook for pay in lieu of notice after lower courts' awards are struck down by SCC

By Jeffrey R. Smith

The Supreme Court of Canada has struck down bad-faith and punitive damages against Honda Canada in a landmark wrongful dismissal case dealing with employee absences related to a disability.

The Ontario Superior Court of Justice and the Ontario Court of Appeal both found Honda discriminated against employee Kevin Keays and acted in bad faith by refusing to accept doctor's notes that said his frequent absences were due to chronic fatigue syndrome (CFS). It demanded notes for every CFS-related absence and asked him to attend its own medical assessment. When Keays declined to meet with the company doctor and retained a lawyer, Honda fired him.

The Supreme Court of Canada, in a decision released in June, agreed Keays was wrongfully dismissed and upheld the 15 months' pay in lieu of notice awarded by the trial court. However, in a 7-2 decision, the court struck down the extra nine months' bad-faith damages and $100,000 in punitive damages, because it said Honda did not act in bad faith and was within its rights to rely on the opinion of its own medical experts.

In stripping the bad-faith, or *Wallace*, damages, the Supreme Court said this type of damages should only be applied if the employer's conduct directly caused damages resulting in a loss to the employee. The court also said punitive damages were only justified in situations where the employer's actions were particularly outrageous and malicious.

The Supreme Court's decision is good news for employers, said Stuart Rudner, an employment lawyer with Miller Thomson in Toronto. Not only can employers feel more comfortable in using attendance management programs where a disability is involved, but it appears they will be able to get a better idea of when bad-faith damages will be awarded and how much they might be.

ACCOMMODATION

"Previously, *Wallace* damages were arbitrary, but now they will be more compensatory," said Rudner. "Employees will have to prove a loss to get the extra damages. It's a more rational approach."

The Human Resources Professionals Association (HRPA) of Ontario, which had intervened in the case on behalf of its members due to concern over the right of employers to use doctor's notes to manage attendance, was very pleased with the decision, said Stephen Rotstein, general counsel of the HRPA.

"Absenteeism is a huge problem to the Canadian economy and the Supreme Court has confirmed to employers they can use doctor's notes as a way to manage their attendance," said Rotstein. "Employers can now be more confident in dealing with absenteeism in employees." CELT

IN THIS ISSUE

CASE IN POINT: Scrapped damages in *Keays* good news for employers

The Supreme Court of Canada has struck down bad-faith and punitive damages awarded by lower-level courts in *Keays v. Honda Canada Inc.* The decision confirmed employers can ask for information before implementing accommodation and also established parameters for the awarding of bad-faith damages in wrongful dismissals. 4-5

Ask an Expert

with

Brian Kenny

MacPherson Leslie and Tyerman, Regina

Have a question for our experts?
E-mail **carswell.celt@thomson.com.**

PRIVACY: Using employee e-mails as grounds for discipline

Question: To what extent can an employer with no e-mail policy read an employee's e-mails that are not addressed to it but contain content regarding the employee's poor opinion on practices within the company? Can the e-mails be used as evidence of insubordination justifying discipline?

Answer: Perhaps the key legal response in the Canadian privacy law landscape is "balance." The federal Privacy Commissioner said "an employer's need for information should be balanced with an employee's right to privacy."

This direction has clearly been reflected in the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA), which came into effect in May 2000, and relevant case law from before and after it came into force. The key question is whether, in all of the circumstances, the employee's e-mail communication should be subject to a reasonable expectation of privacy on the part of the employee.

PIPEDA

For employers who are federally regulated, PIPEDA functions to place limitations on the employer's right to simply intercept and review employees' e-mail communications. The act stipulates an employer may collect, use or disclose personal information only for purposes a reasonable person would consider appropriate under the circumstances. Thus, if an employer were to be challenged on the issue of surveillance it would have to provide clear evidence of a situation that reasonably required use of it. Likewise, if an employer were to find itself in a situation where it wanted to use an employee's e-mail as evidence against the employee for insubordination, the employer would have to demonstrate use of the information from the e-mail was reasonably justified.

PIPEDA reflects the balancing of competing interests that is evident from the case law. In *R v. Weir*, an Alberta case involving child pornography and privacy issues, the court concluded electronic mail ought to carry with it a reasonable expectation of privacy under the *Canadian Charter of Rights and Freedoms*. In 1999, the British Columbia Supreme Court built on *Weir* with its decision in *Pacific Northwest Herb Corp. v. Thompson*, where the court looked at whether an employee has a reasonable expectation of privacy with regards to his workplace computer use. The employee used a company computer at home for work and personal use and after being dismissed he continued to use the computer in preparing materials for a wrongful dismissal action against his employer. Despite the employee's attempts to erase the files, the employer was able to retrieve them. Ultimately, however, the employee was successful in convincing the court a reasonable expectation of privacy existed over those files which he had attempted to erase, as they were "personal."

Reasonable expectation of privacy

While *Pacific Northwest* helps secure some ground for the protection of an employee's reasonable expectation of privacy, other cases have defined "reasonable" such that employers have been afforded the right to monitor e-mail and Internet activity. In *International Association of Bridge and Structural and Ornamental Ironworkers, Local Union No. 97 and Office and Technical Employee's Union, Local 15*, the arbitrator concluded an employer had not violated an employee's privacy when it salvaged personal files from her computer. Despite the fact many of the documents were password-protected, the employer was found to be justified in retrieving them when it was revealed most of the documents were saved during working hours.

In cases like *International*, adjudicators have been willing to hold that employees should not expect privacy in relation to their workplace e-mail communications which are delivered and received using the employer's equipment and Internet connection. The balance has tilted in favour of the employer's right to monitor and control the inappropriate use of its computer system.

Workplace policies

It should be noted in circumstances involving workplace policies the concept of reasonable expectation of privacy is viewed very differently. In *Milsom v. Corporate Computers Inc.*, the Alberta Court of Queen's Bench determined an employee has no reasonable expectation of privacy with respect to e-mails sent and received on an employer's computer, even in the absence of a corporate policy to the contrary.

Four-step approach

Ultimately, it appears employers have the right to monitor e-mail and Internet use but only where the circumstances call for such measures. In a recent case from the Federal Court, *Eastmond v. Canadian Pacific Railway*, a four-step approach was formulated to assess whether monitoring of workplace e-mail communications is reasonable. The court found, at minimum, an employer should be able to demonstrate reasonableness if:

- the e-mail monitoring is necessary to meet a specific need;
- the monitoring is likely to be effective in meeting that need;

Continued on page 6

Retirement agreements: The next frontier in employment contracts?

Without mandatory retirement, employers will be looking for ways to bring certainty to planning of staff levels

By Nicole Byres

With the elimination of mandatory retirement in most provinces, employers cannot require nor compel employees to retire at 65 or any other age. Consequently, employers will be looking for ways to bring some certainty to human resource planning. Retirement agreements, if drafted carefully, can be a tool which helps achieve that objective.

Employers who previously relied on retirement at 65 to manage and predict employee turnover will be looking for new ways to do it without breaching human rights laws. However, conflicting objectives could present a problem. Some older employees might have valuable skills and experience, while it would be preferable for others to retire because of operational needs or poor performance. With the conflict between an employee's right to choose her retirement date and the employer's need for certainty, retirement agreements might be able to bridge the gap.

EMPLOYMENT CONTRACTS

Employment contracts are usually a good way to ensure clarity on important terms of the employment relationship and the limits of an employer's liability for notice or pay in lieu of notice for termination without cause. Provided they are truly voluntary, retirement agreements can confirm a fixed date an employee will retire and any changes in employment terms and conditions leading up to it.

Courts have considered the interpretation and enforceability of employment contracts and certain principles have evolved that make employment contracts more technical than some may realize. Also, employers and employees are not permitted to contract out of employment standards, labour codes and human rights laws. Retirement agreements should be drafted with these principles and laws in mind.

Given the usual bargaining power of employers, they should carefully consider their communications to employees about these agreements so there is no doubt employees are freely entering into the agreement to fix the retirement date. As a first step, employers may want to consider sponsoring retirement planning seminars to encourage employees to think about their circumstances and better equip them to make informed decisions. However, any agreements to blanket mandatory retirement policies will be void if they attempt to contract out of employment standards legislation.

It will not be enough to promise *status quo* in employment terms and conditions in exchange for a promise to retire on a certain date. Employers who want to actively encourage retirement — or retention — of their older workforce should consider incentives that appeal to older workers, such as phased retirement, financial bonuses or other perks.

Unilateral material changes to the employment relationship can expose an employer to a claim of constructive dismissal, so it is important to document in writing an employee's agreement to any changes. What may seem like an attractive decrease in workload or stress to a senior employee may in practice result in a loss of influence of prestige he did not anticipate. Employers will want to ensure employees have faced up to these possible consequences at the outset and documented their consent in the retirement agreement.

Prior to the mandatory retirement bans, it was common for employers with underperforming employees to put up with performance problems if the employee was close to retirement age. Now it is important to manage performance proactively. If employers do not already have performance review processes which include performance improvement agreements, they will want to consider implementing one. They will not be able to institute performance management measures or criteria only on older employees.

Employers should always be alert to the possibility some performance problems may be based on a disability or illness, which triggers legal obligations to accommodate to the point of undue hardship. As the average age of employees increases, requests for accommodation will likely increase. While age in itself is not considered a disability, employers will be expected to accommodate reasonable age-based limitations, provided they can do so without undue hardship. Retirement agreements which provide for changed or phased reduction in work responsibilities can be a way for an employer to meet its duty to accommodate. CELT

ABOUT THE AUTHOR

Nicole Byres

Nicole Byres is a partner with Clark Wilson LLP in Vancouver, specializing in labour and employment law, energy and natural resources law and business litigation. She can be reached at (604) 643-3173 or nmb@cwilson.com.

CASE IN POINT: ACCOMMODATION

Scrapped damages in *Keays* good news for employers

Supreme Court of Canada ruling in favour of Honda clarifies duty to accommodate and what constitutes bad faith

By Ronald S. Minken

The Supreme Court of Canada's decision in *Keays v. Honda Canada Inc.* was far from what many had expected, but it provides both employers and employees with an important clarification on the limits and expectations associated with an employer's duty to accommodate a disabled employee. This duty requires the employer to conduct a thorough investigation of an employee's disability. The employee may see this as an intrusion and refuse to abide by the employer's requests, as was seen in the communication between Honda and Kevin Keays.

The decision provided the clarification that was long needed with respect to an employer's duty to accommodate a disabled employee and an explanation with respect to when damages will be awarded for the conduct of dismissal as well as punitive damages.

"The real gist of what (Justice Rosenberg of the Ontario Court of Appeal) retained of the allegations against Honda was Honda was a lean organization, they were tired of carrying this guy, they understood an obligation to accommodate, they were tired of doing that and this is the inference he took from the overall pattern of facts. So, one can, as you're doing, attack each individual fact, but (Rosenberg) says when you take them all together what was being done here was an attempt to deprive (Keays) of his accommodation," Justice William Binnie said to Honda's counsel.

Taking such comments as Justice Binnie's into account, it seemed apparent Honda's conduct was being scrutinized in order to determine whether it was simply bad, or conduct which should be labelled as bad faith and worthy of damages.

No bad-faith conduct by Honda

The Supreme Court found there was no evidence indicating Honda's conduct towards the accommodation of Keays was in bad faith or deserving of punitive damages. Instead, the only award upheld from the decisions of both the trial judge and the Court of Appeal was that of 15 months' pay in lieu of notice.

In reaching this decision, the Supreme Court held that the four points on which the trial judge had based his findings of bad faith were without evidentiary support. Three of these four points are related to Honda's accommodation of Keays.

Firstly, there was no evidence indicating a March 28, 2000, letter from Honda to Keays was a deliberate misrepresentation of the views of both Dr. Affoo, who was one of Keays' doctors, and Dr. Brennan, the doctor used by Honda, on Keays' disability.

"Dr. Affoo concluded that Keays was able to work and should try to work as much as possible," the court said, while "Dr. Brennan communicated to Honda that he was unable to diagnose Keays with chronic fatigue syndrome (CFS) without meeting with him first." Honda, according to the court, was simply relaying the medical information it received from the doctors to Keays and did not act in bad faith by doing so.

Secondly, the court did not see any evidence Dr. Brennan was taking a "hardball" approach towards Keays and his condition. Instead, Brennan was simply stating his medical opinion that he "could not, with the information that was provided to him, accept a diagnosis of CFS without first meeting Keays."

Even if Brennan had been playing "hardball," the court could not fault Honda for accepting Brennan's advice and opinion without evidence of a conspiracy to terminate Keays.

Thirdly, the court found Honda did not act in reprisal when it halted Keays' accommodation program. Rather, the accommodation process had been stopped in order to allow Brennan to confirm Keays' disability, though he was unable to since Keays refused the request to meet with Brennan.

These three points clarify what is appropriate conduct when accommodating an employee's disability. By finding the actions of Honda in each of these situations did not warrant bad-faith damages, the court determined what actions by an employer are permissible in relation to its duty to accommodate.

Bad-faith damages for employee loss stem from employer conduct

The duty to accommodate has been further clarified by the court's decision. The court found Honda didn't do anything that warranted an award of punitive damages. Referring to its 2002 decision in *Whiten v. Pilot Insurance Co.*, it said courts should only resort to punitive damages in "exceptional cases." It also cited the 1989 decision in *Vorvis v. Insurance Corp. of British Columbia*, which indicated actions worthy of punitive damages must be "harsh, vindictive, reprehensible and malicious."

The court found Honda committed no

Continued on page 5

CASE IN POINT: ACCOMMODATION

Conduct must directly result in employee loss for damages

...continued from page 4

such acts in dealing with Keays and his condition. The requirement of a doctor's note for every absence was not discriminatory, but was simply differential treatment in order to accommodate Keays by establishing "an expected rate of absences which would not give rise to disciplinary action."

Furthermore, the court said that when awarding punitive damages, the focus must be on the employer's misconduct and not the employee's loss. Therefore, the court commented that even if the award for damages for the conduct of dismissal had been upheld, the punitive damages could not be awarded because Keays would have been compensated for the same loss twice.

"Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle (to compensate for a loss directly resulting from the employer's breach of the employment contract) and no extension of the notice period is to be used to determine the proper amount to be paid," the court said. "The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages."

Accordingly, bad-faith damages should be based on the employee's actual loss, similar to tort damages.

Employers can request information before accommodating a disability

In rendering this decision, the Supreme Court of Canada has established what is acceptable conduct when accommodating an employee, and therefore not worthy of bad-faith nor punitive damages in dismissal. Now, an employer will not be overreaching, but rather reasonable, when making requests for information to clarify an employee's disability before modifying the workplace or work schedule and ensure the employee is not punished for conduct related to her disability, such as absences from work. Furthermore, an employer is permitted to terminate an employee with notice if such reasonable requests related to accommodation are not fulfilled by the employee.

If an employer's requests related to accommodation are not reasonable, the employer could be found to have constructively dismissed the employee and be ordered to pay the employee in lieu of notice. An award of damages may additionally be made based on the conduct of dismissal, taking into account the employee's loss. An award of punitive damages could be made based on the employer's misconduct, provided, of course, the *Whiten* and *Vorvis* tests are met and there is no doubling up of compensation to the employee.

The clarification on the duty to accommodate provided in this decision by the Supreme Court of Canada has the potential to add further stability to employment relationships in the future. It simultaneously provides the possibility for an employee to receive proper accommodation for a disability through information requested by the employer, while supplying the employer with information to make the workplace more accessible for the employee and minimizing the likelihood of an employer engaging in the sort of behaviour that would attract damages for bad-faith conduct and punitive damages. CELT

For more information see:

- *Keays v. Honda Canada Inc.*, 2008 CarswellOnt 3743 (S.C.C.).
- *Whiten v. Pilot Insurance Co.*, 2002 CarswellOnt 537 (S.C.C.).
- *Vorvis v. Insurance Corp. of British Columbia*, 1989 CarswellBC 76 (S.C.C.).

The *Whiten* and *Vorvis* tests

PUNITIVE DAMAGES are usually not awarded on top of wrongful dismissal damages because the intention of the latter is to compensate for loss from the dismissal itself. The employer's conduct must constitute a separate loss than from the breach of contractual duties to warrant punitive damages.

In *Vorvis v. Insurance Corp. of British Columbia*, a fired employee was denied punitive damages for bad conduct by a supervisor because it happened before the dismissal and didn't aggravate the damage caused by the dismissal itself. However, the court did say aggravated damages could be awarded if the conduct resulted in a separate "actionable wrong." The Supreme Court of Canada found Keays was in a similar situation in that Honda's actions didn't affect his loss from the wrongful dismissal.

In *Whiten v. Pilot Insurance Co.*, Pilot Insurance accused a family of deliberately burning down their house, though there wasn't any real evidence of this. Pilot was found to have acted maliciously towards the family, taking advantage of their vulnerability and punitive damages were awarded. The Supreme Court of Canada cited this case as an example of the type of conduct where punitive damages should be awarded, and Honda's conduct towards Keays did not meet this standard of "malicious, high-handed" behaviour.

ABOUT THE AUTHOR

Ronald S. Minken

Ronald S. Minken is a senior lawyer at Minken & Associates P.C., an employment law boutique located in Markham, Ont. He can be reached at (905) 477-7011 or www.EmploymentLawIssues.ca. *Minken gratefully acknowledges Kyle Burgis and Sara Kauder for their assistance in preparation of this article.*

ASK AN EXPERT

...continued from page 2

•the loss of privacy is proportional to the benefit gained; and
•there is no alternate and less invasive way of achieving the same end.

The best circumstance for the employer is to have a policy that explicitly communicates to employees that workplace e-mail communications are not subject to any reasonable expectation of privacy. Having such a policy essentially removes any doubt from that question. In the absence of a policy, there is the possibility an adjudicator would consider the employee's expectation of private communications in relation to her e-mails could be reasonable. There is, therefore, a risk that an employer who intercepts such communications could be seen to have violated an employee's privacy.

It is also worth noting the *Criminal Code* makes it an offence to "willfully intercept a private communication" by means of any electromagnetic, acoustic, mechanical or other device. In at least one case from Alberta, a court has held e-mail messages are potentially included within the scope of this section of the *Criminal Code*. In the Alberta case, the court concluded although workplace e-mail should be accorded some privacy protection, it is not the same as other means of private communications such as a traditional first-class letter.

In the absence of a workplace policy that clearly stipulates employee e-mails should not be subject to a reasonable expectation of privacy, there is some risk an employer will be violating privacy rights if it intercepts such communications. Even so, adjudicators have been willing to view workplace communications as having less of a basis for a reasonable expectation of privacy. This is particularly so where the employer provides the equipment and Internet hookup, the communications take place in the workplace and the employee is aware the employer regularly accesses workplace computer systems for maintenance, repairs and upgrades.

Finally, it should be borne in mind not every critical communication by an employee concerning the employer will be considered to be insubordinate. The term "insubordination" has been defined in *Black's Law Dictionary* as "a willful disregard of an employer's instructions, an act of disobedience to proper authority, a refusal to obey an order that a superior officer is authorized to give." There must be some element of flouting or challenge to the employer's legitimate authority. Simply complaining to a co-worker, for example, about the employer's policies may not amount to insubordination.

Employers should be cautious about intercepting an employee's e-mail communications, particularly in the absence of an e-mail policy that clearly states there is no reasonable expectation of privacy in relation to workplace e-mails. In the absence of a policy, it is necessary to examine all of the circumstances of the communication to assess whether or not there would be a reasonable expectation of privacy in relation to the communication that has been intercepted. Finally, such e-mails may not amount to insubordination if they don't present a real challenge to the employer's legitimate authority. CELT

In the absence of a policy, the employee's expectation of private communications could be reasonable. However, adjudicators have been willing to view workplace communications as having less of a basis for a reasonable expectation of privacy.

For more information see:

- *R v. Weir*, 1998 CarswellAlta 151 (Alta.Q.B.).
- *Pacific Northwest Herb Corp. v. Thompson*, 1999 CarswellBC 2738 (B.C. S.C.).
- *International Association of Bridge and Structural and Ornamental Ironworkers, Local Union No. 97, and Office and Technical Employee's Union, Local 15*, [1997] B.C.C.A.A.A. No. 630.
- *Milsom v. Corporate Computers Inc.*, 2003 CarswellAlta 599 (Alta. Q.B.).
- *Eastmond v. Canadian Pacific Railway*, 2004 CarswellNat 1842 (F.C.).

Brian Kenny is a partner with MacPherson Leslie and Tyerman LLP in Regina. He can be reached at (306) 347-8421 or bkenny@mlt.com.

FROM THE ARCHIVES

BRIAN KENNY looked at the topic of monitoring employee computer use and the need to formally notify employees of this practice in his Ask and Expert column in the March 28, 2007, issue of *Canadian Employment Law Today*. To view this article, go to www.employmentlawtoday.com, click on Advanced Search and enter article #1246.

In the June 20, 2007, issue of *Canadian Employment Law Today*, employment lawyer Helen Gray discussed guidelines for employers when dealing with employee personal information and privacy, including the monitoring of e-mail and Internet usage in the workplace. To view this article, enter article #1311 on the Advanced Search page of www.employmentlawtoday.

CORRECTION

In the June 4, 2008, issue, the byline for the Case in Point story on Evans and the Teamsters Local Union No. 31, beginning on page 1, was incorrect. The article was written by Natalie MacDonald.

MORE CASES

COMPILED BY JEFFREY R. SMITH

LABOUR RELATIONS: Car trouble is not pressing personal business worthy of paid leave: Board

A BRITISH COLUMBIA company is not required to pay an employee for missed time at work because of car trouble, the B.C. Arbitration Board has ruled.

Derek Mason, a customer help representative for Telus Mobility in Burnaby, B.C., was driving to work on Nov. 1, 2006. On the way, his car started having problems and he drove to a side street and called the British Columbia Automobile Association (BCAA) for assistance. He stayed with the car until a BCAA tow truck arrived and took his car to a garage. He then went to work and arrived nearly two hours late.

Mason claimed he shouldn't lose any pay for his missed time as the collective agreement stipulated employees were allowed up to one day off with pay to attend to "pressing personal business," which was defined as a personal matter that only the employee can take care of and can't wait.

However, Telus disagreed, saying car trouble didn't meet the collective agreement's definition and Mason wasn't entitled to be paid for the time he missed.

The board agreed with Telus in finding Mason didn't need to miss time and the situation could have waited. The situation wasn't urgent, the board said, and vehicle breakdowns were normal, everyday occurrences that didn't meet the agreement's intention of allowing employees to deal with unique, urgent matters.

Mason's way of handling the situation was what he thought was the best way to handle it, the board said, but not the only way. Given he had to get to work, he could could have locked the car, gone to work and dealt with it later or could have had someone else deal with it. Instead he chose what was more convenient but caused him to be late to work.

"The convenient way dealing with personal business is not the same as pressing personal business," the board said. "It was the manner chosen by (Mason) to deal with the car breakdown which made him late for work, not the circumstances of the breakdown."

The board found the breakdown didn't meet the requirements of "pressing personal business" under the collective agreement and ruled Telus wasn't required to pay Mason for the time he missed because of it. See *Telus Communications Inc. v. T.W.U.*, 2008 CarswellBC 992 (B.C. Arb. Bd.).

LABOUR RELATIONS: Permanent layoff became temporary layoff when workers unexpectedly called back: Court

A GROUP of Ontario workers who were laid off for nearly a year then rehired were on a temporary layoff and entitled to benefits under their collective agreement, the Ontario Court of Appeal has ruled.

Canadian General-Tower (CGT), a producer of coated fabrics and films for industrial applications based in Cambridge, Ont., laid off an entire shift of workers, totalling 23 people, on Oct. 29, 2004. The layoff notices indicated CGT would maintain recall rights for either 12 or 24 months.

The collective agreement the company had with its union provided a supplemental unemployment benefit plan (SUB), which allowed a weekly benefit for employees who were on temporary layoff. The SUB was added to employment insurance benefits to provide employees who qualified with 80 per cent of their regular pay.

However, the SUB and the collective agreement didn't specifically define what constituted a temporary layoff. When CGT laid off the 23 workers, it did so because of shortage of work and issued records of employment that indicated the layoffs were permanent. Despite retaining recall rights, the company didn't expect to have any work for them within the one- or two-year recall period and hence the layoff was likely permanent. Because of this, the company said the workers didn't qualify for SUB benefits. It also offered career transition workshops to help the workers find other jobs.

In September and October 2005, CGT recalled the workers and all but one returned. The recalls were the result of unexpected circumstances brought on by medical leaves, long-term disability leaves and terminations. The company maintained the layoffs were originally expected to be permanent and, despite the recalls, the employees still didn't qualify for SUB benefits.

An arbitrator disagreed with CGT's justification, finding that though there may have been no expectation of a recall, they were called back to work 49 weeks after the layoffs, which was within their recall rights under the collective agreement. As a result, the workers could be considered to have been on temporary layoff and entitled to the SUB benefits.

CGT applied for judicial review, where the Ontario Divisional Court found the arbitrator's decision to be reasonable and dismissed the application.

The Ontario Court of Appeal upheld both decisions, finding the arbitrator was the best qualified to interpret what was a collective agreement issue and made the right finding using an appropriate standard of reasonableness. The appeal was dismissed and CGT was required to pay SUB benefits to the workers. See *Canadian General-Tower Ltd. v. U.S.W.*, Local 862, 2008 CarswellOnt 2836 (Ont. C.A.).

MORE CASES ONLINE

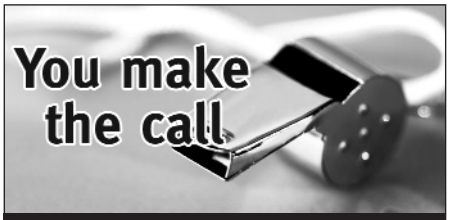
To view articles from past issues, go to www.employmentlawtoday.com and click on "More Cases."

Worker takes a stand for ergonomic chair

This instalment of You Make the Call looks at a worker who claimed his medical restrictions weren't accommodated.

An employee at an Ontario plant of TRW Canada, a manufacturer of linkage and suspension automobile parts, suffered a back injury in 1994 and received workers' compensation benefits for three years.

When he returned, the worker did a variety of jobs. At times he had back problems but was able to deal with them with help. In mid-2003, he was laid off briefly and returned in another job. However, he had a hard time with the new position because it was physically demanding. TRW tried to accommodate him but his back pain was too much.



How would you handle this case? Read the facts and see if the judge agrees

A functional abilities evaluation determined the worker had permanent restrictions, including limitations on repetitive movements. He went on short-term disability leave in November 2003.

The worker returned to work in a new job, that of RS socket operator, by early 2004. The job was done in a standing position while assembling parts. This aggravated his back, but he found by using another worker's ergonomic chair to take occasional, brief breaks, he could do the job.

Soon, however, the other employee moved to a different area of the plant and chained the chair to the workstation so it couldn't be taken. Without the chair, the worker's condition got worse. He submitted a note from his chiropractor requesting his own ergonomic chair, but he didn't receive one.

After taking a two-week vacation in October 2004, the worker returned to the job he worked before his 2003 disability leave. However, he couldn't handle the physical work and stopped on the third day. His chiropractor recommended he take a week off but he never returned to work. He also provided another note saying he could return to work if he had an ergonomic chair.

TRW had an occupational therapist review the jobs at the plant. The therapist determined none of the work available could be done by someone with the worker's restrictions. All the jobs required repetitive actions and there "were no reasonable modifications evident to accommodate the worker," including the socket operator job, which required repetitive movements and positioning contrary to the worker's restrictions.

The union argued the worker had successfully performed the socket operator job for eight months by taking small breaks in an ergonomic chair and by not providing him with one it was refusing to allow him to return to work.

You make the call

- ☑ Should the worker have been reinstated to the socket operator job with the accommodation of an ergonomic chair?
  OR
- ☑ Did the worker's permanent restrictions preclude him from performing the job even with accommodation?

IF YOU SAID the worker's restrictions precluded him from performing the job, you're right.

The board said TRW made an effort to accommodate when it conducted the analysis and evaluation of the worker's job and restrictions. Though using an ergonomic chair would relieve some of his difficulties, the board found the actions and positions required to actually do the work exceeded his permanent restrictions. Since the chair was not "logically and medically connected" to performing the job, it was not a reasonable accommodation, nor would it help the worker stay within his restrictions.

"Even though a person may be able to perform a task or an activity on occasion which exceeds his restrictions, the purpose of permanent restrictions is that a person should not perform that task or activity over time," the board said. "Whether the (worker) was able to perform the job successfully over a period of six or eight months is irrelevant."

The board ruled TRW did not have to reinstate the worker to the socket operator job with an ergonomic chair. See *TRW Canada Ltd. v. Thompson Products Employees' Assn.*, 2007 CarswellOnt 8887 (Ont. Arb. Bd.). CELT

CANADIAN
Employment Law Today

Published biweekly 24 times a year
Subscription rate: $299 per year

Customer Service
Tel: (416) 609-3800 (Toronto)
(800) 387-5164 (outside Toronto)
Fax: (416) 298-5082 (Toronto)
(877) 750-9041 (outside Toronto)
E-mail:
carswell.customerrelations@thomson.com
Website: www.employmentlawtoday.com

THOMSON
CARSWELL

One Corporate Plaza
2075 Kennedy Road, Toronto,
Ontario, Canada M1T 3V4

Director, Carswell Business: Ben Wentzell
Publisher: John Hobel
Managing Editor: Todd Humber
Editor: Jeffrey R. Smith
E-mail: jeffrey.r.smith@thomsonreuters.com

We acknowledge the financial support of the Government of Canada, through the Publications Assistance Program (PAP), toward our mailing costs.
Canada
GST #897176350
Publications Mail Registration No. 7651