MATHEWS DINSDALE

Employer's Advisor

A NEWSLETTER FROM MATHEWS, DINSDALE & CLARK LLP

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"Best Lawyers" Lawyer of the Year 2010

Mathews Dinsdale is proud to announce that "Best Lawyers", the oldest and most respected peer-review publication in the legal profession, has named our *S. David Gorelle* as the "Toronto *Best Lawyers* Workers Compensation Lawyer of the Year" for 2010. He is also regularly rated as a leading practitioner in the Lexpert Directory with respect to WSIB Law. *David* was Ontario's first Law Society Certified Specialist in WSIB law; is a former Chair of the Law Society's Specialist Certification Committee for WSIB; former member of the OBA Executive Committee with respect to WSIB law and works with employers in all areas of WSIB law. Congratulations *David*.

Accessibility Standards for Ontarians with Disabilities in the Workplace

Proposed standards under the *Accessibility for Ontarians with Disabilities Act, 2005 ("Act"),* if implemented, could impact the way employers in Ontario direct their workplaces. These standards arise from the *Act's* purpose, which is to develop, implement and enforce accessibility standards that will apply to public, private and non-profit sectors alike.

The Employment Accessibility Standards Development Committee, whose members include representatives from Ontario's disability and business communities, began meeting in the fall of 2007. The purpose of the meetings was to develop and draft proposed Employment Accessibility Standards ("Standards") that are intended to help employers create equal employment opportunities for people with disabilities.

The Standards, as submitted for consideration to the Minister of Community and Social Services, would apply to all organizations in Ontario that have at least one paid employee.

In order to promote the purpose of the *Act* without unduly burdening employers, the Committee's proposed Standards include suggested timelines for organizations to comply with their requirements. At this stage, it appears that compliance will be required within two to four years, depending on the size of the organization and whether it is in the public or private sector. Private sector organizations with 49 or fewer employees will be spared from any undue burdens by virtue of the Committee's suggested exemptions for small companies from many of the more onerous requirements.

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Specific recommended standards include the following:

- Organizations must have up-to-date accessible employment policy statements;
- Organizations must provide disability awareness training for all their employees on how to create and maintain an inclusive workplace;
- Organizations must advise job applicants that they will accommodate individuals with disabilities. Organizations must also have formal procedures to accommodate job applicants with disabilities;
- Organizations must provide information about how employees can ask for accommodation and how employees who request accommodation can participate in the process. Organizations must also have formal procedures on establishing accommodation plans for employees;
- Organizations must provide training on the essential job duties when an employee who requires accommodation takes on new responsibilities;
- Organizations that provide their employees with career development and advancement information must make sure that their employees with disabilities receive the information in a manner consistent with their individual accommodation needs; and
- Organizations must identify and use measures to assess their success in providing equal employment opportunities for people with disabilities.

Employers will need to make sure their policies, practices and procedures are up to date and meet these substantial requirements when they are implemented.

Family vs. Work – Discrimination on the basis of Family Status

The struggle to balance family life and work obligations is one that all parents face. In a recent arbitration award, this delicate balance was explored. The employer changed the work schedule from an 8 hour, 5 day schedule to a 10 hour, 4 day one. Four grievors alleged that the new schedule interfered with their ability to carry out child care responsibilities and interact with their children, discriminating against them on the basis of family status.

The grievors alleged varying conflicts with the new schedule. These conflicts ranged from an inability to attend their children's sporting or extra-curricular events to suffering more fatigue from the longer days, to altering a custody agreement.

Arbitrator Jesin accepted that a parent has an obligation to maintain the health, safety and security of their children and also an obligation to spend time with their children, to guide them, and to teach them. However, he also noted that parents must work, and these two obligations will sometimes be difficult to reconcile.

The decision follows jurisprudence with respect to family status which now shifts some of the burden to employers to assist parents with some of the more difficult choices they may have to make. The decision concludes that it is often easier for an employer to facilitate a needed accommodation that will allow an employee to continue to be a productive employee while also allowing that employee to fulfill important parental obligations. However, Arbitrator Jesin also held that not every conflict between a work obligation and a parental obligation is the responsibility of the employer to accommodate, as not every conflict should give rise to a finding of discrimination triggering the accommodation process.

An employer cannot be expected to establish terms of work that avoid all conflicts with each and every characteristic of family status. Nor should employees expect such accommodation. Arbitrator Jesin held that a conflict arising from a change in the workplace rule is an important factor to consider because employees

who accommodate themselves to existing rules may find it difficult to accommodate new rules that may impede on their ability to fulfill their parental obligations. Of note, it was also found that a change in an employee's family status will have the same affect as a change in an employer's rules or schedules. He also held than an employee's effort at "self accommodation" should be taken into account in determining whether discrimination is established. The effort required by the employee was qualified however, noting an employee should not be asked to make choices which are unreasonable in the circumstances. For example, it would be unreasonable to expect an employee to relocate at considerable expense. On the other hand, it would be reasonable to expect an employee faced with a new schedule to at least consider and investigate alternate day care options if existing day care conflicted with the schedule change.

Three of the four claims were dismissed. Arbitrator Jesin held that it is not unreasonable to expect that workplace obligations will require spouses to cooperate in order to split their parental duties and meet their workplace duties. He also held that it is a fact of life that parent's work schedules may conflict with their ability to attend some of their children's extra-curricular activities, or that a new schedule may be more tiring. Neither of these conflicts constituted discrimination warranting his intervention.

The final grievance was upheld and sheds light on what might be considered discriminatory. The grievor was forced to alter an amicable custody sharing agreement. This included having his children move in with their mother and change schools. It was held that a change in a workplace rule which forces parents to alter, to their detriment, a carefully constructed custody agreement that benefits both the parents and the children, may be discriminatory. It was not an answer to suggest the grievor should move cities or hire a private nanny.

This decision is illustrative of the obligations of both employees and employers to accommodate family obligations. It also indicates that every day conflicts will not be enough to for a finding of discrimination.

The Risks of Filing a Late Response to Certification Applications

The recent Ontario Labour Relations Board decision of *M3C Demolition Ltd.* highlights the perils when an employer misses the deadline for filing its Response to a union Application for Certification.

M3C Demolition Ltd. dealt with a certification application in the construction industry. The owner of M3C (the "Company"), had moved. However, his prior home address remained the registered corporate address of the Company and the registered Corporate Profile had not been updated. The company owner had made arrangements with Canada Post to have all mail forwarded to his new residence. The Company's new contact information was displayed on certain internal documents, but was not displayed on anything the Union would have been able to access.

The Union's attempts to obtain the owner and the Company's current contact information, such as conducting an internet search on www.yellowpages.ca, were unsuccessful. Accordingly, the Union delivered the certification application documents to the prior home address, which was the business address listed on M3C's Corporation Profile Report. The Union used a courier on two separate occasions to deliver the application package.

The Company did not become aware of the certification application until the time limits for filing a Response had expired. Upon becoming aware of the application, the Company took immediate steps to file a Response, but it was ultimately filed approximately four business days late.

The Board found that the Union had completed a valid delivery of the application. The Board cited with approval the Labour Board's jurisprudence which acknowledges that, "under the circumstances

where a business address is provided for the public, the party which provided that address that ignores and fails to advise itself of correspondence does so at its peril".

The Board declined to extend the time limits for the filing of the Response. Even accepting that the oversight of not updating M3C's new mailing address with the Ministry of Consumer and Business Services was an "innocent error," the Board noted that it was not a circumstance that was beyond the Company's control. Rather, the Board stated that, "if the responding party had organized its business affairs in a manner that allowed for correspondence, including the hand delivery of legal documents, to sit unattended for a significant number of days, it must accept the consequences of that action."

Accordingly, the Board proceeded to determine the certification application based solely on the information provided by the Union, and without regard to M3C's position as set out in its late-filed Response. Indeed, the Labour Board's Rules of Procedure specifically state, "where a responding party fails to file a response, he or she may be deemed to have accepted all of the facts stated in the application and the Board may decide the matter based upon the material before it without further notice." Because MC3 was late in filing its Response, it was unable to resist the certification application and the board certified the Union. Employers must be sure to keep their contact information up-to-date, and should also ensure that correspondence is received and reviewed on an ongoing basis. Those who miss response deadlines, do so at their own peril.

Seminars and Presentations:

December

On December 3rd, 2009, ***Paula Rusak*** spoke to an employer's supervisor group in Toronto on "Progressive Discipline".

January

On January 11th, ***Paula Rusak*** spoke to an employer's management group on "Management Rights" in Toronto.

On January 12th, ***Genevieve Debané*** presented a seminar to the Chatham HRPAO on recent changes to the Occupational Health and Safety Act and the Employment Standards Act, 2000.

On January 13th, ***David Defrancesco*** and ***David Gorelle*** spoke to a private sector health care provider on "The Duty to Accommodate, Attendance Management, and Managing Claims Under the WSIA."

On January 19th, ***Susan Houston*** spoke to the Sarnia Lambton HRPAO, in Sarnia, on "Current Issues in Employment Law."

On January 21st ***Mark Mills*** and ***Matthew Carroll*** spoke to a group of employers in Sarnia on "Bill 168: Violence in the Workplace".

On January 25th, ***David Francis*** gave a lecture to a George Brown College construction law class on "Construction Labour Law in Ontario."

On January 28th and 29th, ***Ian Johnstone*** co-chaired the 2nd Annual Ontario Association of Chiefs of Police Labour Conference.

March

On March 1st and 2nd a number of Mathews Dinsdale lawyers will speak to the Police Association of Ontario Conference. ***Elizabeth Keenan*** will speak on "Investigating Workplace Harassment"; ***Ian Johnstone*** will speak on "Reasonable Rules and Regulations Established By A Chief of Police and Their Contestability by Associations or Members"; ***David Cowling*** will speak about "Charges for Unsatisfactory Work Performance Under the Police Services Act"; and ***Rick Baldwin*** will speak about "The Impact of McNeil Related Production Issues on the Employment Relationship".

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