MATHEWS DINSDALE

Employer's Advisor

A NEWSLETTER FROM MATHEWS, DINSDALE & CLARK LLP

SEPTEMBER 2008

Supreme Court Affirms Employers' Right to Terminate for Chronic Absenteeism

The Supreme Court of Canada recently rendered an important decision in *Hydro Quebec v. Syndicat des Employees de Techniques Professionelles et de Bureau d'Hydro Quebec*, affirming an employer's right to terminate employees for chronic absenteeism.

In the case, the Complainant had missed 960 days of work over a period of approximately seven and one-half years. During that time, Hydro-Quebec had accommodated the Complainant for a number of physical and mental disabilities, including reactive depression and mixed personality disorder, that had caused the absences. The Complainant was terminated during a continuous absence of five months when the Employer received an opinion from a psychiatrist indicating that the Complainant would continue the past absenteeism pattern and would not be able to work on a regular and continuous basis.

Hydro-Quebec administratively dismissed the Complainant due to her inability to work on a regular basis because, based on the medical opinion, no improvement in her attendance was expected. The Complainant filed a grievance through her Union.

The arbitrator dismissed the grievance, finding that Hydro-Quebec had proven that at the time of its decision to terminate the Complainant was unable, for the reasonably foreseeable future, to work steadily and regularly as provided for in the employment contract.

The Union judicially reviewed the arbitrator's decision to the Superior Court, which upheld the arbitrator's decision. The Union then appealed to the Quebec Court of Appeal, which reversed the decision on the basis that the Arbitrator had misapplied the law. The Court of Appeal found that the Complainant was not totally disabled from working and, therefore, Hydro-Quebec had to prove that it was impossible to accommodate the Complainant's disability. Further, the Court of Appeal found that the extent of the employer's duty to accommodate had to be assessed at the time Hydro Quebec made the decision to dismiss the Complainant. Hydro-Quebec was granted leave to appeal to the Supreme Court of Canada.

INSIDE

In overturning the Court of Appeal and affirming the Arbitrator's original decision, the Supreme Court discussed at length the duty to accommodate, stating that its purpose is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship. The Supreme Court found that in determining whether Hydro-Quebec had accommodated the Complainant, an assessment of the entire situation had to be made, including the pattern of absenteeism based on past illnesses.

Further, the Supreme Court stated that the duty to accommodate does not completely alter the essence of the contract of employment which requires the employee to perform work in exchange for remuneration.

The Supreme Court concluded that in cases involving chronic absenteeism *"if the employer shows that, despite measures to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship. In such circumstances, the employee's dismissal will be considered non-discriminatory."*

Dealing with absenteeism issues is always difficult for employers. This case reaffirms an employer's right to expect some level of regular attendance and performance of work. However, each situation is still unique and needs to be assessed on its own merits. If you are dealing with absenteeism issues with your employees please do not hesitate to contact one of our team of lawyers for assistance.

Director's Liability for Employee Wages

Assessing Director's liability with respect to an Ontario provincially regulated corporation involves several statutes, including the *Ontario Business Corporations Act* (*OBCA*), the *Ontario Employment Standards Act, 2000* (ESA) and the federal *Bankruptcy and Insolvency Act (Canada)* (*BIA*).

With some exceptions, the *OBCA* provides that directors are jointly and severally liable to employees of the corporation for all debts not exceeding six months' wages that become payable to each employee for services he or she performed for the corporation during the time that the directors were in office. The *ESA* then takes liability one step further and provides, with some exceptions, that directors are jointly and severally liable to employees for wages (not including termination pay or severance pay); vacation pay, which is the greater of 4% of wages or the amount agreed upon in any employment contract; holiday pay, at the greater of those provided under the *ESA* or the amount agreed upon in any employment contract and overtime wages, at the greater of those provided under the *ESA* or the amount agreed upon in any employment contract.

The statutes, as well as the decisions interpreting those statutes, indicate that the responsibility for debts to employees lies primarily with the corporation. However, if the corporation fails to satisfy those debts, the director(s) becomes responsible for debts during, or six months after, the period of his or her directorship (or up to two years after same if the nature of the corporation is under federal jurisdiction).

In a recent Divisional Court decision, *Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Benefit Trust Fund and Gord Hintze and Drywall Plus Ltd* ("Drywall Plus"), the Court revisited the issue of Director's liability. The sole issue in the Drywall Plus case was whether the defendant, a director of a small construction company, was personally liable under the *OBCA* for debts to employees who had performed services for the corporation.

In making the decision, the Court has reinforced prior decisions finding that directors' liability is limited to the amount equivalent to six months wages, for up to six months after the director has held his or her office (unless the action falls within federal jurisdiction), and for the services the employee performed for the corporation.

In making this decision the Court interpreted the heading in the OBCA entitled "Directors' liability to employees for wages", as providing no mandate that liability is limited to wages only. The Court ultimately agreed that the director's liability was limited to situations "where the debts are for services performed for the corporation" and the amount is "equivalent to six months wages payable to each employee."

It is important for corporations, and their directors, to ensure that there is adequate coverage, for any such liabilities that may accrue to directors. If you are a shareholder in and/or a director of an incorporated entity, it is especially important that you are aware of your potential liabilities. If you are concerned about these issues please do not hesitate to contact any member of the Mathews Dinsdale team.

Workers' Wages Now Protected Against Employers' Bankruptcy

On July 7, 2008, the *Wage Earner Protection Program Act* (the "*WEPPA*"), as well as amendments to the *Bankruptcy and Insolvency Act* (the "*BIA*") and the *Companies Creditors' Arrangement Act* (the *"CCAA"*) came into effect. The *WEPPA* and the amendments to the *BIA* and *CCAA* create a new system with respect to employee claims for wages and pension contributions when their employers are in bankruptcy or receivership.

If an employer is bankrupt or in receivership, employees may now apply to the Wage Earner Protection Program (the "WEPP"), which is administered by the Federal Government, to receive outstanding wages earned in the six months prior to the bankruptcy filing up to a maximum of $3,000. "Wages" for the purposes of WEPP includes salaries, commissions, compensation, and vacation pay, but does not include severance or termination pay.

When an employee applies for payment from the WEPP, the employee will be required to sign over his or her wage claim, up to the amount paid, to the Government of Canada. The Government may then claim the amounts it paid under the WEPP from the bankrupt estate.

Under the *WEPPA*, trustees and receivers are also required to facilitate the process by:

- identifying each individual who is owed wages that were earned in the six months prior to the bankruptcy filing or the date on which there was a receiver;
- determining the amount of wages owing to each individual;
- informing each individual of the existence of the WEPP;
- providing the Minister with information, including the amount of wages owing to each individual in respect of the 6 month period; and,
- informing the Minister when the trustee is discharged or the receiver completes their duties.

Trustees or receivers who fail to comply with these obligations may face penalties.

Under the amendments to the *BIA*, employees' claims for unpaid wages now have "super-priority" over secured creditors. Specifically, an employee's charge against a bankrupt estate for unpaid wages earned in the six- month period prior to the date of bankruptcy (or receivership) have super priority over secured creditors with respect to the "current" assets (including accounts receivable and inventory) of the bankrupt employer up to a maximum of $2000. "Wages" includes vacation pay but not severance or termination pay.

Further, super-priority has also been created for unpaid amounts in respect of prescribed pension plans. If a bankrupt employer participated in a prescribed pension plan for the benefit of employees, claims for unpaid pension contributions and claims for amounts deducted from the employees' remuneration for payment to the fund also receive super-priority over all secured creditors.

Insight on Immigration

The "Insights On Immigration" corner, prepared by our lawyers who provide employment-related immigration advice, provides updates on employment-related immigration matters affecting employers. Should you have any questions with respect to any of the below-noted topics, or have any other immigration-related questions, please contact: ***Jennifer Kerr at tel: (416) 869-8531 or e-mail: jkerr@mathewsdinsdale.com***

Federal Government Announces Post-Canadian Experience Class

In our March 2008 newsletter, we reported on the Federal Government's intent to create the Canadian Experience Class (CEC) category as a way to assist certain skilled temporary Foreign Workers and Foreign Student Graduates with Canadian work experience to permanently immigrate to Canada. The CEC may also assist a significant number of employers due to the number of such individuals who come to Canada annually. In 2007, for example, about 165,000 foreign workers and 74,000 foreign students entered Canada on work or student permits.

The CEC's goal is greater responsiveness to Canada's employers, by allowing individuals to apply for permanent residence while continuing to work for their Canadian employer within Canada. Selection will be based on a pass/fail system rather than the point system now required under the Federal Skilled Worker Program, the most common program used by temporary foreign workers to remain working in Canada.

On August 12, Citizenship and Immigration announced the details of the CEC. Propose regulatory changes have been published in the Canadian Gazette for 15-day commentary. There after, further changes may be published. The Immigration and Refugee Protection Regulations will be amended to create the CEC and to describe the requirements for selection. The CEC will allow certain temporary foreign workers with a designated level of managerial, professional, technical, or trade work experience to apply for permanent residency, and eventually, for citizenship. Lesser-skilled occupations will not be eligible. Student qualifications will include graduation from a Canadian college or University, one year of work experience furthering skills for professional or technical positions, and modern or basic language skills.

The development of the CEC follows a number of recent initiatives by the Government to help make Canada a more attractive destination for skilled workers from across the globe. It is hoped that this new CEC — which allows an Applicant's Canadian experience to be considered as a key selection factor in immigration — along with the other previously introduced initiatives, will assist Canadian employers in attracting and retaining good foreign workers.

Seminars and Presentations:

Rick Baldwin will be speaking at the AMEMSO Conference on September 25, regarding recent issues in collective bargaining.

On October 21 in Sarnia, ***Susan Houston*** will present "Your Employment Law Update," to the Sarnia-Lambton Human Resources Professionals Association of Ontario.

Paula Rusak and ***Angela Bradley*** will present a Mathews, Dinsdale lunch and learn seminar on recent developments in Ontario human rights law, on October 29 in Sarnia.

On October 30, ***Steve Wilson*** will participate on a panel presentation entitled, "Revisiting Foundational Decisions in Labour Arbitration," as part of the Labour Arbitration Conference presented by Lancaster House and the University of Toronto, Centre for Industrial Relations and Human Resources, in Toronto.

Mathews, Dinsdale & Clark LLP Barristers and Solicitors

Toronto
One Queen Street East,
25th Floor, Toronto,
Ontario M5C 2Z1
Tel (416) 862.8280
1.800.411.2900
Fax (416) 862.8247

Sarnia
201 Front Street North,
Suite 501, Sarnia,
Ontario N7T 7T9
Tel (519) 336.5447
Fax (519) 336.9181

Sault Ste. Marie
65 Willow Avenue
2nd Floor, Sault Ste. Marie,
Ontario P6B 5B1
Tel (705) 253.3711
Fax (705) 253.1102

www.mathewsdinsdale.com