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EMPLOYERS' ADVISOR
A Newsletter from Mathews Dinsdale & Clark LLP March 2012

14th Annual National Labour Arbitration Competition

Mathews Dinsdale would like to extend its congratulations to **Natasha Jategaonkar** and **Glen Tedham** of the University of British Columbia, winners of the **2012 Mathews Dinsdale National Labour Arbitration Competition!**

The competition required students from across Canada to research and argue both sides of a case, including whether an employer could require an independent medical examination of an employee and whether an employer could discipline or discharge an employee for a posting on Facebook.

Students made their arguments in front of panels of judges, adjudicators and practitioners from the labour and employment law field.

Changing Approaches to Interpretation of the Occupational Health and Safety Act

In two recent decisions, the Ontario Labour Relations Board found that its powers are limited with respect to complaints made under the new harassment provisions of the *Occupational Health and Safety Act*. The cases also illustrate a trend in decision-makers suggesting that it is not appropriate to apply a liberal interpretation to the Act's wording in the belief that a liberal interpretation is necessary to achieve the legislation's public policy purposes. Instead, these decisions suggest that the focus should be on the actual wording of the legislation.

In *Investia Financial Services Inc.*, a worker alleged that his dismissal was a reprisal for making harassment complaints. Shortly thereafter, in *Ludlow Technical Products Canada Ltd.*, the Board addressed an employee's claim that her employer had failed to investigate her complaint of harassment in accordance with its anti-harassment policy.

In dismissing both complaints, the Board started with the premise that it only had the jurisdiction to hear disputes expressly provided for by legislation. The question became: "What powers were given to the Board under the Act's new harassment provisions?"

In this respect, the Board concluded that the new harassment provisions of the Act do not create an obligation on employers to successfully prevent workplace harassment, do not provide the Board with the jurisdiction to inquire into allegations that an employee was fired for complaining about harassment, and do not provide the Board with the jurisdiction to adjudicate the practical application of a policy that otherwise complies with the Act. Instead, the Act simply requires employers to put in place a workplace harassment policy and program, and provide further information and instruction to employees as appropriate. >

The Court of Appeal recently applied a similar letter-of-the-law approach in *Sheehan's Truck Centre Inc.* In this case, when a 25-foot-long truck that was for sale was being moved, it got stuck. An employee offered to help clear the obstruction from behind the truck, but while this worker was clearing the obstruction, the driver reversed the truck and drove over the worker, causing a serious injury.

The employer was charged under the Act's Industrial Regulations, pursuant to a section that requires a signaller for vehicles handling materials where there is not a clear view of the path of travel. The Court of Appeal found that the truck was not a vehicle or similar material-handling equipment within the meaning of the Regulation, and acquitted the company.

The Court of Appeal reasoned that the protective purpose of the Act's legislative scheme is not the only consideration when interpreting the scope of specific legislative provisions. The legislation's words must be "interpreted in the entire context in which they are used and in accordance with their grammatical and ordinary sense, having regard to the purposes of the Regulation and Act as a whole."

Adjudicators have long applied a liberal and purposive interpretation of the Act and its regulations. These decisions suggest a move away from this approach. For employers, these decisions confirm that the protective purpose of the Act's regulatory scheme cannot override the legislation's actual wording.

Use and Abuse of Social Media

Social networking sites - such as Twitter and Facebook - have been around for a number of years. Over the past year, there has been greater media coverage in the United States about teachers who have been disciplined or even fired for making off-duty comments about students on Facebook. The comments have ranged from disparaging remarks about a student's hairdo, and descriptions of students as "future criminals" and teachers as "wardens," to jokes about student deaths.

School boards are not alone in dealing with these issues. Examples include: individuals involved in the Vancouver Stanley Cup riots being terminated after posting pictures and comments on Facebook, a caregiver in a home for the aged being terminated after criticizing co-workers and management and revealing confidential information about residents on a personal blog, transit employees coming under fire for allegedly using mobile devices to access social networking sites while operating vehicles, and an airline pilot being terminated for making disparaging comments about First Nations clients on a personal blog. Examples of employee misuse of social media are growing daily.

It is not surprising that these issues have found their way into the workplace. However, many employers are at a loss as to how to curb the use of such sites during working hours in order to minimize their impact on productivity. Even worse, what should an employer do when they learn that an employee is making disparaging comments about the company on Facebook, is tweeting about co-workers, or is criticizing supervisors in the context of a personal blog?

This behaviour raises a number of issues, including the extent to which an employer can and should regulate its employees' off-duty conduct and the scope of an employer's obligation to protect employees from off-duty electronic harassment by co-workers.

Arbitrators have found that it is often acceptable to discipline an employee for conduct that materially affects the workplace or the company's reputation or business practices; however, firing an employee for >

inappropriate remarks made online is much more difficult, and depends on the factual circumstances of each case.

Even so, there are a number of things employers can do to minimize the disruption that social networking sites might have on the workplace:

- *Block access to social networking sites from work computers.*
- *Update computer-use policies that are in place to include provisions for rules that govern social networking and Internet use.*
- *Ensure that your workplace violence and harassment policy covers off-duty harassment of employees through social networking sites, email, phone, or otherwise.*
- *Train staff on what types of online, off-duty behaviour is prohibited.*
- *Be willing to acknowledge when outbursts are out of character, but ensure the consistent application of your progressive discipline policy.*

For more information on issues that relate to the use of social media by employees both on- and off-duty, or for assistance on developing workplace policies, please speak to a Mathews Dinsdale lawyer.

Court Resistance to Broad Non-Competition Clauses

The Court of Appeal decision in *Mason v. Chem-Trend* is the latest in a series of cases in which Ontario courts have struck down non-competition clauses as being overbroad and therefore unenforceable.

Prior to his termination, Mason had been employed as a technical salesperson for Chem-Trend for 17 years. He had acquired knowledge regarding the company's products, customers, and pricing arrangements. His sales territory included all of Canada as well as certain areas of the United States.

Mason's employment contract contained a non-competition clause that stated that for a period of one year following his termination he would not engage in any activity in competition with Chem-Trend by providing services to, or soliciting business from, any entity that was a customer of Chem-Trend during his employment. There was no geographic limitation on this restriction.

Mason brought an application seeking a declaration that the restrictive covenant was unenforceable. The application was denied, with a finding that the restriction was enforceable. Mason appealed.

The Court of Appeal overturned the earlier decision, finding that the restriction was unenforceable for a number of reasons. The Court concluded that the restriction was overbroad, relating to any company that had been a customer of Chem-Trend during Mason's entire 17- year employment history as opposed to only relating to Chem-Trend's current customers.

The prohibition on any dealings with any former customers was unjustifiable given that Mason was but a part of the technical sales force for a large company that had worldwide relations with its customers, a number of which also operated in many countries. As such, it would be difficult for Mason to determine which potential customers even fell within the scope of the clause, because at no time did he have access to a list of all of Chem-Trend's customers.

The Court opined that broader prohibitions on competition might be justified with respect to higher-ranked employees such as presidents, CEOs or CFOs of a company, but that they were not justified in the context of a technical sales representative. >

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Having found that the restrictive covenant was overbroad, the Court struck down the entire non-competition clause. The Court cited the recent Supreme Court decision of *Shafron*, which affirmed that unenforceable restrictive covenants cannot be read down to be made enforceable, but, rather, must be struck in their entirety.

Chem-Trend is the most recent in a number of cases that illustrate that non-competition clauses, as opposed to non-solicitation clauses, are subject to close scrutiny by the courts. They will not be upheld if they are overly broad in terms of their geographic scope, the length of time they remain in effect, or in terms of the breadth of the activity they seek to prohibit. Employers must ensure that any restrictive covenants contained in employment contracts are drafted with absolute clarity, and that they do not contain restrictions that are broader than necessary to protect the employer's legitimate business interests.

Seminars and Presentations

January 2012

Steve Bernardo participated as an event judge at the Inter-Collegiate Business Competition (ICBC) at Queen's University in early January. ICBC is the largest student-run business case competition in North America.

February 2012

On February 15th, **Dan Attwell** presented to a group of construction contractors on *Achieving Compliance with the Accessibility for Ontarians with Disabilities Act.*

On February 27th and 28th, a number of Mathews Dinsdale lawyers spoke at the Police Association of Ontario Conference. **Elizabeth Keenan** spoke about *Attendance Management Programs,* **Mark Contini** spoke about *Unsatisfactory Work Performance,* and **Rick Baldwin** spoke about *The Board vs. the Chief - Where Does the Operational Line Get Drawn?*

March 2012

On March 7th, **Joe Liberman** will participate as a panel member at a Construction Collective Bargaining Symposium hosted by the Ontario Construction Secretariat on the topic of *Different Approaches to Collective Bargaining.*

On March 28th, **David Francis** will speak at the Ontario General Contractors Association's Construction Law Course on *Construction Labour Relations in Ontario.*