

 **Employment News**

This is a summary of employment matters of interest to the business community, from a litigator's point of view.

We welcome your questions and comments.

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Summer 2002**OFF-PREMISE SEXUAL HARASSMENT GROUNDS FOR DISMISSAL**

In a decision of the Ontario Court of Appeal it was held that an employer had sufficient cause to dismiss an employee who engaged in sexual harassment of an employee after-hours, in the context of a workplace culture which could be considered sexually charged, and which lacked a harassment policy.

Six distinct incidents that occurred over a span of years formed the alleged cause of dismissal of a management level employee. The Court considered whether such incidents could constitute sexual harassment as they occurred outside of work hours. In that regard the Court overturned the decision of the trial judge, and held:

"It would be artificial and contrary to the purpose of controlling sexual harassment in the workplace to say that after-work interaction between a supervisor and other employees cannot constitute the workplace for the purpose of the application of the law regarding employment-related sexual harassment. The determination of whether, in any particular case, activity that occurs after hours or outside the confines of the business establishment can be the subject of complaint will be a question of fact."

The Court then considered whether it was possible that in a workplace in which there was no established sexual harassment policy, to excuse conduct on the basis that it was "consensual conduct among friends". The alleged conduct had been excused by the trial judge on the basis that it rose from the existence of a sexually charged workplace. In that regard, the Court of Appeal found it to be an error to disregard the supervisory role of the plaintiff and treat him as one of the employees. The Court recognized that employees may feel constrained from objecting where the offending conduct is that of a supervisor for fear of reprisal or dismissal. Accordingly, silence can not be taken as implied consent as

had been found by the trial judge.

The Court went on to find that the sexual culture which existed was created by the plaintiff himself and the trial judge erred in not holding him accountable. The lack of a sexual harassment policy in the workplace did not excuse the Plaintiff's conduct. The Court commented that the Plaintiff, as executive director, had the obligation to initiate such a policy and was not entitled to benefit from its absence.

Accordingly, the several incidents and ongoing situations which amounted to a pattern of sexually harassing conduct on the part of the plaintiff, were held to constitute just cause for the plaintiff's dismissal.

The Court overturned the trial judge's decision. Leave to appeal to the Supreme Court of Canada has been sought.

UPDATE ON WALLACE DAMAGES

Since the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers* in 1997, the concept of "Wallace" damages has become well-known to employment law practitioners.

The Ontario Court of Appeal recent overturned an award of punitive damages where "Wallace" damages had also been awarded and brought into issue whether an award of punitive and "Wallace" damages is duplicitous.

Punitive damages may be awarded when

- 1) the defendant's conduct is so "harsh, vindictive, reprehensible and malicious" or "so malicious, oppressive and high handed" that it offends the court's sense of decency;
- 2) the defendant committed a separate or independent actionable wrong; and,
- 3) "if the compensatory damages are insufficient to express repugnance at the conduct of the defendant and to punish and deter".

"Wallace" damages are awarded as a result of wrongful conduct on the part of an employer in dismissing an employee in such a manner as to violate the obligation to deal with the employee fairly and in good faith. Accordingly, the facts relevant to "Wallace" damages would also be considered for an award of punitive damages. Therefore, the Court questioned, although in obiter, whether there could ever be justification for punitive damages where "Wallace" damages were already awarded because the expression of repugnance has presumably already been made by the award of "Wallace" damages. We can expect further consideration of this issue in the near future.

STATUS OF TRADE UNIONS FINALLY FORMALIZED

Though union matters are not ordinarily the subject matter of this publication, the recent decision in *Berry v. Pulley* of the Supreme Court of Canada justifies mention.

The highest court has now proclaimed the right of a trade union to sue and be sued in its own right. This decision reverses over fifty years of jurisprudence to the contrary. The implication is that representative actions and/or class proceedings will no longer be necessary to deal with matters relating to the labour relations functions of a union, including membership and disciplinary functions.

Iacobucci J. on behalf of the Court wrote:

"In light of the significant powers and duties of the union vis-à-vis its members, and in particular its ability to enforce the terms of the membership agreement internally, it is only logical to hold that the legislature has intended unions to have the status at common law to sue and be sued in matters relating to their labour relations functions and operations."

This decision represents a fundamental change in the state of labour law in recent history.

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