Common but Complex Employment Situations

Mary Mackinnon and Marie Powell
Raven, Cameron, Ballantyne, and Yazbeck LLP

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Common but Complex Employment Situations

I was asked to speak with you today about a number of somewhat complex employment scenarios that your clients may present you with. The situations which seem to commonly arise today — inappropriate use of internet, chronic or intermittent disability, drug or alcohol use, personal harassment — may be situations that clients would not have been faced with 20 years ago — or, in which their responses, based on case law developments, will need to be much more carefully developed than they would have, 20 years ago.

Because these areas can be complex, but seem to be arising fairly commonly, we've entitled my presentation "Common but Complex Employment Situations", but we've been referring to it around the office as "Sex, Drugs, and Rock & Roll", and below you'll find out why.

Internet/Email Abuse

The media has made employees' personal use of computers during business hours a hot topic. In Canada, a 2000 Angus Reid Group poll concluded that nearly 800 million work hours are wasted each year by Canadian employees in personal internet use.[1] However, what the polls and articles do not mention are the vast increases in workplace productivity generated by use of email and internet in the past 15 years; nor the loss of productivity of other non-computer workplace time-wasters.

Against this backdrop, the question arises as to how employers should deal with personal use of the internet or email. The issue will typically arise either/both as an issue of significant non-work-related use; or access of pornographic material.

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[1] Michael Geist, *Computer and Email Workplace Surveillance in Canada: the Shift from Reasonable Expectation of Privacy to Reasonable Surveillance* (Prepared for: Canadian Judicial Council, March 2002), at p. 6

There have been a significant number of arbitration decisions, involving unionized employees. In all cases, the employee was dismissed for inappropriate use or inappropriate content. The key factors that determine whether or not employees will be reinstated include:

- type of material accessed; if inappropriate, *how* inappropriate (eg. immature/tasteless vs. harmful/degrading)
- whether the access or the material accessed violates an employer policy or is illegal
- consistent application of policy; whether policy is flexible
- whether the material is accessed, downloaded, shared, or published
- has anyone been targeted or harassed
- volume of the activity
- special nature of employment vs. the material accessed (eg. educators incautious of access of pornography by students)

While discharges have been upheld,[2] arbitrators have also substituted lesser penalties taking into consideration a variety of mitigating factors as well as the doctrine of progressive discipline.[3]

In *MNR* a number of government employees were discharged for using their Ministry computer and email accounts to receive and send inappropriate material, including some of which was described as being 'quite offensive'.[4] In determining

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[2] See for example, *Greater Toronto Airports Authority v. P.S.A.C.*(Gorski) (2001) 101 LAC (4th) 129 (Murray); *Telus Mobility v. T.W.U.*,(Lee) (2001) 102 L.A.C. (4th) 239 (Simms); *Alberta (Department of Children's Services) and A.U.P.E.* (L. (R.)) (2005) 138 LAC (4)th 301 (Joliffe)

[3] See for example, *Canadian Pacific Railway v. International Brotherhood of Electrical Workers* (Lahaie) [2000] CLAD no. 151 (Picher); *Ontario (Ministry of Natural Resources) v. O.P.S.E.U.*, (Wickett) (2005) 143 L.A.C. (4th) 14 (Petryshen) [*MNR*]; *Dupont Canada Inc. v. C.E.P.* (Panter) [2001] O.L.A.A. no. 676 (Roach).

[4] *MNR, Ibid*. at 29.

that the employer did not have just cause to discharge the grievors,[5] and that discharge was an 'excessive response in the circumstances',[6] the Arbitrator considered a number of mitigating factors including

- condonation: managers were accessing and sharing the same files
- the length of service of the grievors
- lack of illegal activity
- lack of training in the proper use of e-mail
- sincere remorse and shame

The arbitrator reinstated the grievors substituting a suspension ranging from two to ten months for the Employer's original decision to dismiss.

In *Owens-Corning Canada Inc. v. C.E.P., Loc. 728* ,[7] the grievor was terminated for using the company computer system to access material that was described as "obscene, vulgar and disrespectful".[8] The Arbitrator substituted a seven-day suspension for the termination, in large part due to lack of consistency in enforcement of the Policy noting that of all the employees who breached the employer's policy, only the grievor was terminated.

It is important for employers to lay out clear rules on the limits of internet and email use and to apply these rules consistently. Without such guidance, what is found to be offensive to some may not be to others. However, even the Courts have long grappled with what is considered to be offensive in the legal sense under the Criminal Code.

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[5] *Ibid*. at 28.

[6] *Ibid*. at 59.

[7] *Owens-Corning Canada Inc. v. C.E.P., Loc. 728* (2002) 113 LAC (4th) 97 (Price) (QL).

[8] *Ibid.* at 15 of 20.

Few judges have yet had to consider this type of situation. Those courts that have, have applied the same tests as arbitrators. For example, in *Manchulenko v. Hunterline Trucking Ltd,* [9] the employer argued that its post-termination discovery of inappropriate email and internet access constituted cause. The court held otherwise, as the material was unsolicited, foolish rather than horrifying, and there was no evidence of excessive material, significant time spent, damage to the computer system, or distribution to coworkers or customers. However, arbitrations for non-unionized federal jurisdiction employees under the *Canada Labour Code* have consistently upheld terminations for access to internet pornography.[10]

In conclusion, when employers are faced with inappropriate personal internet use, they should be advised that they do not, necessarily, have grounds to terminate. Your clients will need to consider how their employee's situation is situated in terms of the factors drawn from the cases, and make a considered decision about whether they have cause to terminate, can correct the employee's behaviour and continue with the employment relationship, or must consider severance arrangements.[11]

Substance Abuse: a Hybrid Issue

One of the more difficult issues that arbitrators adjudicate are grievances related to substance abuse problems. These grievances often deal with workplace behaviour that, but for the underlying disability that caused the inappropriate behaviour,

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[9] *Manchulenko v. Hunterline Trucking Ltd.* [2002] B.C.J. No. 1472 [*Manchulenko*] (QL)

[10] See *Krain v. Toronto-Dominion Bank*, [2002] C.L.A.D. No. 406 (Luborsky); *C.T. v. Bank of Montreal*, [2005] C.L.A.D. No. 74 (Newman)

[11] See additional examples of arbitral decisions both upholding terminations and substituting lesser penalties: *Nova Scotia Teachers' Union v. Chignecto-Central Regional School Board* (DeGrass), [2004] N.S.L.A.A. No. 11 (Ashley); *Catholic District School Board of Eastern Ontario v. Ontario English Catholic Teachers' Assn*. (Kannon), [2004] O.L.A.A. No. 14 (Stephens); *Seneca College v. O.P.S.E.U.* (No. 00A364), [2002] O.L.A.A. No. 415; *Loyalist College of Applied Arts and Technology v. Ontario Public Service Employees Union*, Local 420 (P.C.), [2004] O.L.A.A. No. 485 (Knopf); *Consumers Gas v. C.E.P., (Primiani)* [1999] O.L.A.A. No. 649 (Kirkwood); *Westcoast Energy Inc. v. C.E.P., Loc. 686B* (Bourdon), (1999) 84 L.A.C. (4th) 185 (Albertini);*Hydro One Networks Inc. v. P.W.U.* [summarized in 65 C.L.A.S. 342][unreported decision](Steward).

would be *prima facie* culpable acts that would result in discipline, including dismissal.[12]

However, where disability is found in these cases, generally speaking neither Arbitrators nor the Courts will uphold an automatic discharge for violation of a zero tolerance policy. Instead, and particularly under the more recent "hybrid" model, which combines traditional disciplinary factors with accommodation principles, some form of discipline combined with accommodation has been substituted for termination.

For example, in *Kemess Mines Ltd. v International Union of Operating Engineers, Local 115*,[13] the grievor, a worker for a mining company in a remote location, was caught smoking marijuana in his room. The Company terminated his employment for violating a zero tolerance policy. The Arbitrator found substance dependence and the company was required to accommodate the grievor's addiction to marijuana.

The arbitrator accepted that this was a "hybrid" case, which included both culpable and non-culpable conduct. The latter related to the disability and therefore warranted a full human rights analysis including the duty to accommodate. In place of the discharge, the grievor was reinstated with a ten-month suspension.[14]

The BC Court of Appeal accepted the arbitrator's conclusion that the Company had not accommodated the grievor to the point of undue hardship,[15] even in the context

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[12] Michael Lynk, "*Mental Disability, Substance Addiction and the Accommodation Duty in the Canadian Workplace*." *Conference - Advanced Issues in Duty to Accommodate Held March 27-28, 2007* at p.1

[13] *Kemess Mines Ltd. v International Union of Operating Engineers, Local 115*, 2006 BCCA 58 (CanLII) [*Kemess*].

[14] *Ibid*. at para. 5.

[15] *Ibid.* at para. 51.

of a safety-sensitive work environment.[16] The Court held that the employment relationship remained viable, particularly because post-termination, the grievor had successfully completed a rehabilitation programme.[17]

In *Gates Canada v. United Steelworkers of America, Local 9193,*[18] a six-year employee, who the company knew had a drug addiction and who had prior suspensions for coming to work under the influence, was terminated for a drug-related incident at work.[19] The union filed a grievance alleging discrimination based on a disability; namely, addiction to drugs.

The arbitrator reinstated the grievor without retroactive pay with the grievor agreeing to random drug testing up to four times per month. If a test revealed use of drugs, the penalty was automatic discharge.[20] In substituting the penalty, the arbitrator considered new post-discharge evidence that the grievor had been sexually abused at a young age by his father.[21] The union argued and the arbitrator agreed that the grievor had never received proper treatment for his drug addiction since he had not previously admitted the sexual abuse. A deciding factor was the evidence of the grievor's psychiatrist who testified that the grievor was progressing to a full recovery and actively seeking treatment.[22] While the company had done all that it could previously to accommodate the grievor, the new evidence provided additional explanation that warranted a new opportunity for the grievor to seek

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[16] *Ibid*. at para. 38.

[17] *Ibid*. at para. 39.

[18] *Gates Canada v. United Steelworkers of America, Local 9193*, [2006] OLAA No. 683 (Reilly)[*Gates*].

[19] *Ibid*. at para. 4 -10.

[20] *Ibid*. at para. 67.

[21] *Ibid*. at para. 59.

[22] *Ibid*. at para. 62.

rehabilitation and return to work.[23]

While random drug testing was imposed as a condition of the grievor's return to work in *Gates Canada*, the Courts and arbitral jurisprudence have put limits on drug testing more generally.

In *Entrop v. Imperial Oil Ltd*,[24] the Company instituted a drug and alcohol policy that allowed for random, unannounced testing of employees in safety-sensitive positions. The Ontario Court of Appeal, in the context of a human rights complaint, held that random drug testing of all employees was contrary to the *Human Rights Code* because random drug testing using urinalysis cannot measure present impairment.[25]

The rationale for this finding was that a person who tests positive on a random drug test may be a casual user, not a substance abuser and may not have a disability. However, Imperial Oil's policy treats anyone who tests positive as a substance abuser.[26] Since both perceived and actual substance abuse is included in the definition of "handicapped" under the Code, anyone testing positive is adversely affected by the policy. Thus Imperial Oil's policy was found to be discriminatory on the basis of perceived and actual disability.[27]

The random drug tests were also found not to be justified as a bona fide occupational requirement (BFOR) as it did not meet the third step in the *Meiorin* test. While the drugs listed in the policy did have the capacity to impair job

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[23] *Ibid*. at para. 25, 60 - 64.

[24] *Entrop v. Imperial Oil Ltd,* [2000] O.J. No. 2689 (Ont. CA) [*Entrop*]

[25] *Ibid*. at para. 99.

[26] *Ibid*. at para. 92.

[27] *Ibid*. at para. 92.

performance, the court held that random drug testing using urinalysis "cannot measure present impairment," that it only demonstrates past drug use. Thus such drug testing "...does not demonstrate that a person is incapable of performing the essential duties of the position",[28] as "no tests currently exist to accurately assess the effect of drug use on job performance and....drug testing programs have not been shown to be effective in reducing drug use, work accidents or work performance problems," the Court concluded that "random drug testing for employees in safety-sensitive positions cannot be justified as reasonably necessary to accomplish Imperial Oil's legitimate goal of a safe workplace free of impairment."[29]

Random drug testing was also found to suffer from a second flaw: employees in safety-sensitive positions who test positive for drugs or alcohol are automatically terminated. In this respect, the Court found this sanction to be "too severe, more stringent than needed for a safe workplace and not sufficiently sensitive to individual capabilities."[30] Imperial Oil was found to have "failed to demonstrate why it could not tailor its sanctions to accommodate individual capabilities without incurring undue hardship."[31]

Similarly, pre-employment drug testing was also found to suffer from the same flaws: "a positive test does not show future impairment or even likely future impairment on the job, yet an applicant who tests positive only once is not hired."[32] With respect to random alcohol testing, the Ontario Court of Appeal held that Imperial Oil could "legitimately take steps to deter and detect alcohol impairment

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[28] *Ibid*. at para 99.

[29] *Ibid*. at para. 99.

[30] *Ibid*. at para. 100.

[31] *Ibid*. at para. 102.

[32] *Ibid*. at para. 103.

among its employees in safety-sensitive jobs,"[33] that such steps were not in breach of the Human Rights Code.[34]

Alcohol testing, unlike drug testing, was found to accomplish the goal of determining and detecting alcohol impairment. Thus, for employees in safety-sensitive jobs, where supervision is limited or non-existent, alcohol testing is a reasonable requirement".[35] However, random alcohol testing for employees in safety-sensitive position is BFOR only if the sanctions for an employee who tests positive are tailored to the employee's circumstances.[36] In this respect, the Court found that random alcohol testing, though reasonable for employees in safety-sensitive jobs, would not satisfy the third step of the *Meiorin* test, unless Imperial Oil met its duty to accommodate the needs of those who test positive. Thus, dismissal from a single positive alcohol test for employees in safety-sensitive positions was found to be "inconsistent with Imperial Oil's duty to accommodate". Instead, the duty to accommodate required "...consideration of sanctions less severe than dismissal and, where appropriate, the necessary support to permit the employee to undergo a treatment or a rehabilitation program".[37]

More recently, the practice of mandatory pre-employment drug testing providing for automatic dismissal for a positive test without accommodation was also found to be prima facie discriminatory and a breach of Alberta's *Human Rights, Citizenship and Multiculturalism Act.*[38] The complainant, a receiving inspector at the Syncrude Plant in Fort McMurray, was terminated shortly after he began working following a

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[33] *Ibid*. at para. 110.

[34] *Ibid*. at para. 113.

[35] *Ibid*. at para. 110.

[36] *Ibid*. at para. 113.

[37] *Ibid*. at para. 112.

[38] *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.,* [2006] A.J. No. 583 [*Kellogg*] at para. 144.

positive result in a pre-employment drug test.

The policy was found to breach the *Act* since, at a minimum, under the policy, the company refused to employ those with an addiction. However, in this case, the individual who was terminated was only a recreational user, did not suffer from an addiction and thus his claim was not determined on the basis of an actual disability.

Like the policy found to be prima facie discriminatory in *Entrop*, the court in *Kellogg* also found recreational drug users to be negatively affected by the company's policy:

> The Policy imposes a pre-employment barrier, with zero tolerance, automatic termination and no accommodation. It bars individuals from the workforce and a positive test result negatively affects their livelihood. KBR sanctions any person testing positive by the removal of employment on the assumption that the person is likely to be impaired at work in the future and thus not "fit for duty." The Policy not only treats all prospective employees who test positive for drugs the same, it treats them *as if they were drug dependent* and further assumes that they are likely to report to work impaired. Even though Mr. Chiasson may not be drug dependent, the policy operates to treat him as such, and the requirement that he be tested for drugs with an automatic sanction for a positive test is prima facie discriminatory.[39] [emphasis added]

Thus the court found the effect of the company's pre-employment drug policy to be discriminatory on the basis of both actual and perceived disability by excluding both addicted and non-addicted and non-impaired employees from employment.[40]
As in *Entrop*, the Court also identified the flaw in pre-employment drug testing: that it cannot show future impairment, or likely future impairment on the job.[41]

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[39] *Ibid*. at para. 88.

[40] *Ibid*. at para. 101.

[41] *Ibid*. at para. 136.

In a unionized setting, arbitral jurisprudence has "overwhelmingly" rejected random drug testing for all employees in a safety sensitive workplace.[42] Arbitrators have concluded that "to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside of the context of a rehabilitation plan for an employee with an acknowledged problem is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest".[43] Instead, such random, mandatory and unannounced tests have been found to be contrary to the terms of collective agreements unless "expressly and clearly negotiated".[44] The appropriateness of such tests are "not to be inferred from general language describing management rights or from language in a collective agreement which enshrines safety and safe practices".[45]
In its decision to strike the random drug testing from the Company's policy in *Imperial Oil*, the Board directed the Company to stop applying such testing and to "forebear from imposing discipline against any employee for failing to comply with that aspect of the policy".[46]

While arbitrators and Courts place limits on management rights in the context of testing for drug or alcohol use and in addressing inappropriate workplace behaviour related to substance abuse problems, arbitrators have upheld a penalty of discharge where the consumption of drugs or alcohol during working hours was not caused by substance abuse or addiction.

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[42] *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900* [2006] OLAA No. 721 at para. 101 [*Imperial Oil*].

[43] *Ibid*. at para. 101.

[44] *Ibid*. at para. 101.

[45] *Ibid*. at para. 101.

[46] *Ibid*. at para. 134.

For example, in *Toronto Transit Commission and ATU., Local 113,*[47] the collective agreement provided for a specific penalty of discharge for the consumption of alcohol while on duty. In this case, the Arbitrator upheld the penalty of automatic discharge as the grievor's drinking was found not to be caused by alcoholism.[48] The collective agreement expressly eliminated the power of the arbitrator to substitute a lesser penalty in the circumstances.[49] However, the Arbitrator recognized that, at the same time, the union could make a separate and distinct claim of discrimination under the human rights code that the penalty of automatic discharge should be struck down. If successful, it would be open to the Arbitrator to take a broader approach than simply substituting a lesser penalty.[50]

Arbitrator Roberts assessed whether the evidence showed that the grievor actually suffered from the illness of alcoholism. In this case, the grievor was diagnosed as "alcohol dependent." He was not found to have strong cravings with zero ability to control his drinking. The Arbitrator found that alcoholism was not a significant factor in motivating him to drink at work - what motivated him was the chance to socialize. Thus with no finding of a causal nexus between the culpable behaviour and the illness, the Arbitrator held he had no option but to confirm the penalty.[51]

The best advice to provide to your clients, in light of this case law, is:

a) drug testing or termination based solely on 'fails' will nearly always be struck down, absent agreement (collective agreement, employment contract, or last-chance agreement), cause (misconduct), or widespread problems , and even these 3 grounds won't necessary

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[47] *Toronto Transit Commission and A.T.U., Local 113* (Wall), (2006) 149 L.A.C. (4th) 69 (Roberts).

[48] *Ibid*. at 5 of 18.

[49] *Ibid*. 8 of 18.

[50] *Ibid*. at p. 9 of 18.

[51] *Ibid*. at 16 of 18.

vitiate testing;

b) an employer should offer to arrange and pay for a medical and/or drug and alcohol assessment, if circumstances warrant, to assist in determining whether on-the-job impairment or other culpable behaviour (chronic lateness, suspicious absenteeism) is related to a disability; and,

c) if the misconduct is even partly related to disability, accommodation rather than termination is required action.

Frustration of Contract Due to Long Term or Continuing Illness

In the past, employers were able to consistently rely on the doctrine of frustration of contract in dealing with employees with chronic or recurring illnesses. Essentially, the common law doctrine, also incorporated into the *Employment Standards Act*, held that where the employee was unable to fulfill the contract of employment through regular attendance and full performance of the duties for which they were hired, the employer was justified in treating the employment contract as having ended, on a no-fault basis.

That concept, in both the common law and in statute, has been modified or eliminated by human rights/accommodation law, leaving many employers confused about their legal position and potential liabilities in addressing employees in these situations. A few recent cases are illustrative of how things can go wrong.

In *Masters v Willow Butte Cattle co. Ltd. Co.*,[52] the Alberta Human Rights Tribunal found that the employer discriminated in a layoff of a disabled pen rider employee. Approximately seven months into the job, Kathy Masters had a workplace injury and she was off work for one month. Approximately four months later she became ill with a burst appendix, and was off work for close to two and one-half months.

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[52] *Masters v. Willow Butte Cattle co. Ltd. Co*., (2002), 42 CHRR D/321.

The complainant's illness was considered a physical disability under the Alberta *Act* even though the illness was of a relatively short duration. When Ms. Masters asked about returning to work, she was told that there was a shortage of work. The Tribunal found it would not have been beyond the point of undue hardship for the employer to reinstate the complainant since her replacement was still on a three month trial period and could have been laid-off with little or no severance.[53] Finding that the employer failed to meet their duty to accommodate, the Tribunal awarded $1,500.00 for pain and suffering, and four months' wages.[54]

At common law, an employee who is wrongfully dismissed while working and an employee who is wrongfully dismissed while receiving disability benefits are both entitled to damages consisting of the salary that the employee would have earned if the employee had worked during the notice period.[55] In this respect, damages for wrongful dismissal while on disability or on medical leave have been awarded in a number of decisions.[56] In *Thomson,* the plaintiff had worked for the company for over thirteen years when he became ill and went on disability. The Court found he was treated with hostility and disregard once he became ill and was wrongfully terminated. The plaintiff was awarded damages equal to 15 months pay for a total of $92,104.95, and $1,465 for loss of benefits.[57] In *McNamara*, the plaintiff was hired by the company in 1971 and was terminated while on sick leave in 1995. The Court awarded twenty-four months compensation in lieu of notice and an additional two months Wallace damages.[58] In *Sylvester*, the employee was terminated while

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[53] *Ibid*. at para. 42.

[54] *Ibid*. at para. 46-49.

[55] *Sylvester v. British Columbia,* [1997] 2 S.C.R. 315 at para. 9. [*Sylvester*]

[56] See for example, *McNamara v Alexander Centre Industries Ltd*.,[2001] OJ No. 1574 (Ont. CA) (QL) [*McNamara*]; Sylvester, *Ibid.*; *Thomson v Bob Myers Chevrolet Geo Oldsmobile Ltd.* [2001] OJ No. 5228 (QL) [*Thomson*];

[57] *Thomson*, *Ibid.* at para. 30.

[58] *McNamara, supra* note 56 at para. 12.

receiving disability benefits. The Court of Appeal awarded damages equal to 20 months.[59]

Aside from common law damages, employers in Ontario will be liable to qualifying disabled employees for termination and severance pay, when disabled employees are indefinitely laid off or terminated without cause. The *Employment Standards Act* in 2000 exempted from termination and severance pay employees whose contracts of employment had been frustrated, including frustration due to illness/injury. In 2005, in *Ontario Nurses' Association* v. *Mount Sinai Hospital*,[60] the Ontario Court of Appeal affirmed a Superior Court decision which declared that the exemption for severance pay violated s. 15 of the *Charter*. The legislature subsequently amended the *ESA*, so that employees who are terminated individually or as part of a larger layoff, while ill, and who otherwise qualify for these benefits, are now entitled to severance and/or termination pay.

An Ontario employer who terminates an employee while the employee is in receipt of disability benefits will remain liable for severance pay, unreduced by the amount of disability benefit, in some circumstances.

In Sylvester, a government contract employee was terminated in a period when he was receiving disability benefits. At issue was whether disability payments received by the employee during the notice period with premiums solely funded by the employer should be deducted from damages received for wrongful dismissal.[61] The employee, on short-term disability, was notified that he would be terminated due to a reorganization. The Court concluded that disability benefits were deductible from damages for wrongful dismissal. In this case, the Court found that the terms

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[59] *Supra* note 55 at para. 7.

[60] *Ontario Nurses' Association* v. *Mount Sinai Hospital*, [2005] O.J. No. 1739

[61] *Supra* note 55 at para. 2.

of the disability plan demonstrated that the disability payments were to be a substitute for salary. Thus simultaneous payment of both disability benefits and damages for wrongful dismissal were inconsistent with the terms of the employment contract. The Court wanted to avoid a situation of "double recovery" of wages and benefits and ensure equality of damages among all employees affected by the reorganization.

In *Sylvester*, the issue whether disability benefits should be deducted from damages where the employee has contributed to the disability benefits plan was not before the Court.[62] The Ontario Court of Appeal has considered this fact situation in *Sills v. Children's Aid Society of the City of Belleville,*[63] and *McNamara*. In *McNamara,* the Appeal Court noted "double recovery" remained a valid concern when, as in *Sylvester*, the salary and disability benefits come directly from one source, the employer.[64]

However, in Mr. McNamara's workplace, the employer paid the salary but the insurer paid the disability benefits, therefore, double recovery was not an issue. The second distinguishing feature was that the employment benefits were found to be integral to the salary received as an overall compensation package and thus consideration was paid for by the employee for the benefit.[65] Moreover, nothing was found in the terms of the employment contract to suggest either deductibility or non-deductibility. The Court inferred the intention that reasonable parties would have concluded that the disability benefits should not be deducted.[66]

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[62] *Ibid.* at para. 22.

[63] *Sills v. Children's Aid Society of the City of Belleville* [2001] O.J. No. 1577(Ont. CA) (QL) [*Sills*],

[64] *McNamara, supra* note 56 at para. 22.

[65] *Ibid*. at para. 23.

[66] *Ibid*. at para. 29-34.

In *Sills*, the Court found that the plaintiff had made a nominal indirect contribution to the disability plan premiums by way of her Employment Insurance premium reductions.[67] As well, the Court found that the employee had earned the disability benefits "as part of her compensation and as part of her trade-off in arriving at benefits and salary"[68] The Court drew on the insurance exception which exempts private insurance plan payments paid for by the injured party from the rule against double recovery in tort cases to reach its conclusion that the disability payments should not be deducted.[69] The Court concluded that

> absent an express provision precluding double recovery....an employee would not willingly negotiate and pay for a benefit that would allow her employer to avoid responsibility for a wrongful act. I consider it reasonable to assume that parties would agree that an employee should retain disability benefits in addition to damages for wrongful dismissal where the employee has effectively paid for the benefits in question....Moreover, the concern expressed in Sylvester, that disabled employees who are wrongfully dismissed be treated the same as working employees who are wrongfully dismissed, simply does not arise where the employee has paid for the plan that provides a disability income.[70]

As a result, where employees can demonstrate that they have in part paid, either directly or indirectly, for their disability benefit premiums, the employer may still be liable to pay severance even for periods while the employee is receiving LTD.

In Ontario, pursuant to section 60 to 62 of the *Employment Standards Act*, 2000, S.O. 2000 c.41 ("ESA"), an employee's disability coverage continues during the statutory notice period, even if they are not actively at work. As a result, most

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[67] *Supra* note 63 at para. 41.

[68] *Ibid*. at para. 41.

[69] *McNamara*, *supra* note 56 at para. 43.

[70] *Supra* note 63 at para. 45-46.

insurer's disability policies deem active employment to include the statutory notice period. However, most policies will not allow coverage to continue past this period into the common law notice period.[71]

This gap has most recently been addressed in the Ontario Court of Appeal decision in *Egan v. Alcatel Canada Inc.*[72] In *Egan*, the employee was working with Alcatel in a senior management position for twenty-one months when, without notice or cause, she was terminated as part of a mass termination at Alcatel.[73] The employee was paid statutory notice and severance in accordance with the ESA.[74] She was advised that her benefits including both short and long-term disability would be cancelled at the end of her statutory notice period in September 2002.[75] However, the employee became disabled three months following her termination.

In February, the employee applied to her insurer for short and long-term disability benefits but was rejected on the basis that her coverage was no longer in force when she became disabled. Alcatel had cancelled her benefits at the end of the statutory notice period but prior to the end of the reasonable common law notice period. The employee claimed damages for the lost disability insurance entitlements.[76]
The trial judge found that the period of disability began within the notice period awarded. However, she was found to have been denied coverage because Alcatel had cancelled her coverage prior to the beginning of her disability and thus Alcatel

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[71] Arleen Huggins, "*Severance and the Disabled Employee - Egan v. Alcatel Canada Inc*". *9th Annual Six-Minute Employment Lawyer, December 2006* at p. 8-3 to 8-4.

[72] *Egan v. Alcatel Canada Inc.* [2006] O.J. No. 34 [*Egan*].

[73] *Ibid*. at para. 3-5.

[74] *Ibid*. para. 5.

[75] *Ibid*. at para. 25.

[76] *Ibid*. at para. 21.

was held to be responsible for her loss.[77] The Court of Appeal agreed with the trial judge and the Court held that

> Where an employee would otherwise have qualified for disability benefits during the reasonable notice period, but the application is denied on the basis that the coverage was wrongfully discontinued by the employer, the employer must be liable for the value of the disability benefits that would otherwise have been payable. Ms. Egan was entitled to the continuation of all forms of compensation, including employee benefits, during the reasonable notice period.[78]

On this basis, the Court of Appeal found that Alcatel was responsible to pay damages for the short and long-term disability benefits including gross-up. The employee was entitled to recover damages for the entire twelve months of her disability regardless of when the actual notice period ended. Thus, she was entitled to recover damages beyond the 9 months reasonable notice period.[79]

The decision in *Egan* means that in Ontario, an employer will be liable for disability benefits for as long as the disability continues in the event that an employee becomes disabled during the common law notice period.[80]

Interpersonal Issues: When Must Employers Become Involved

"He who has a thousand friends
Has not a friend to spare,
While he who has one enemy
Shall meet him everywhere."

-Ralph Waldo Emerson

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[77] *Ibid*. at para. 26.

[78] *Ibid*. at para. 26.

[79] *Ibid*. at para. 34-35.

Whenever people work together, there will be friends and there will be enemies; in short, there will be interpersonal issues. In what circumstances must employers become involved? In what circumstances should employers beware?

1. Employer's obligations: legislation

The legislatures, in their wisdom, have provided some guidance, though not uniformly. Employers are generally obliged under occupational health and safety legislation, to maintain workplaces free from actual, attempted, or threats of violence.[81] Some jurisdictions oblige employers to ensure that the workplace is also free from personal harassment (Saskatchewan, Manitoba, and see P.S.L.R.A. federally). Ontario health and safety legislation contains no express provisions dealing with interpersonal violence or harassment. However, there have been a few cases in which the Labour Board or arbitrators have found that personal harassment may constitute a 'hazard' for the purposes of Ontario's legislation, which could trigger an employer's obligations.[82]

Thus, where interpersonal matters between coworkers become an issue of health and safety for one or more of the coworkers, an employer's obligation to take action may be triggered.

2. Employer's obligations: collective agreement

Where the employer undertakes in a collective agreement to provide a workplace

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[81] *Canada Labour Code*, s. 125(1)(z.16), Alberta *Occupational Health and Safety Code*, British Columbia *Workers Compensation Act*, Manitoba *Workplace Safety and Health Act*.

[82] *Meridian Magnesium Products Ltd.*, [1996] O.L.R.D. No. 4392; *St. Paul' Hospital and British Columbia Nurses' Union* (McHaffie), (1998) 72 L.A.C. (4th) 129; *Crown in the Right of Ontario (Ministry of the Solicitor General and Correctional Services) v. O.P.S.E.U.* (1997, GSB# 613/94, Mikus)

free from personal harassment, their obligation may also extend beyond the scope of the workplace to external sources of harassment.

The Minister of Health for Nunavut received a petition with 95 signatures about a nurse working in a troubled small community on Baffin Island. Members of the community complained that the nurse had disclosed medical information and was rude to patients. An investigation concluded that the allegations were unfounded. No public announcement was made of these conclusions. Instead, the MLA for the area requested a further investigation. During the course of the second investigation, the nurse was asked about her health, and community members were asked if she was 'doing strange things in town' or in the store. The second investigator also convened a meeting with the nurse and two other staff people who said they felt the nurse's communication style was a problem. The nurse was devastated by these comments. She asked for a transfer to a new workplace. She filed a grievance alleging that the employer's conduct amounted to personal harassment.

The collective agreement provided as follows:

> The employer is committed to promoting a work environment which is free from sexual and personal harassment. The Union and the Employer recognize the right of employees to work in an environment free from sexual and personal harassment. The employer will not tolerate sexual and personal harassment in the workplace.
>
> Personal harassment is any unwarranted behaviour by any person that is directed at and is offensive to an individual or endangers an individual's job, undermines the performance of that job, or threatens the economic livelihood of the individual. Such behaviour may take the form of the application of force, threats, verbal abuse, or harassment of a personal nature, which demeans, belittles, or causes personal humiliation or embarrassment to the recipient(s).

The arbitrator determined that the actions of the employer in engaging in the second unfocused investigation, without terms of reference, in a way that led the community to believe that there were causes for concern, and in making invasive

medical inquiries, all constituted personal harassment, despite absence of bad intent. The employer was ordered to pay $12,500 in general damages for the nurse's emotional suffering, and to reimburse her for counselling expenses.

3. Employer's obligations: managerial authority

Where an employer concludes that an employee has engaged in activity that constitutes personal harassment of a coworker or subordinate, the employer may be justified in imposing discipline. Thus, in a case where an employee verbally harassed a coworker in a meeting, and the employer imposed a 5 day suspension, the suspension was upheld by an arbitrator.[83]

Arbitrators are typically hesitant to dictate to employers the precise nature of discipline or direction which they should impose on employees. Thus, even where an arbitrator found that a disabled meat-cutter's supervisor had verbally harassed him, the arbitrator declined to order an apology, punitive damages, or that the employer assign the supervisor to a position without direct contact with employees for a period of time.[84]

Further, employers should not immediately terminate employees who engage in bullying or harassing behaviour. In a court decision from New Brunswick, an employer was ordered to pay 44 weeks' severance to an 11 year sawmill employee who had not been warned that if his relationships with coworkers did not improve, he could be dismissed. Thus, even in situations where other employees' health and safety may be in issue, and even in non-union situations, the employer has an

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[83] *International Paper Co. v. CEP Local 30-X* [2000] O.L.A.A. No. 459 (Etherington).

[84] *Cargill Ltd. v. UFCW Local 1118* [2004] A.G.A.A. No. 13 (Power).

obligation to warn and/or otherwise follow progressive disciplinary procedures.[85]

4. Potential liabilities

The employer may be liable, as set out in *Devon*, above, for severance for failure to warn, even in cases where the alleged harassment is made out.

Where there are interpersonal issues caused by more than one employee, and the employees are unable to reasonably work together, the employer may be liable to pay severance to an employee even though the employment relationship is no longer viable.[86]

Coworkers may also be liable, if they engage in pranks as part of the pattern of harassment, and their coworker is injured. In *Decision 1438/04* of the Ontario WSIAT (December, 2005), an employee injured in a fall when coworkers removed a wheel from his chair, sought leave to sue his employer and coworkers. His civil action against the employer was dismissed because the employee was in the course of his employment. However, as the coworkers had taken themselves out of the scope of their employment, and the employer neither knew about or condoned their actions, the Tribunal held that the lawsuit against the coworkers could proceed.

In summary, the employer in a personal harassment / bullying situation must balance the interests of the workplace as a whole with the individual interests of the alleged harasser. In some cases, the employer may be justified in imposing

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[85] *Allen v. Devon Lumber Co.* [2006] NBJ No. 528 (November, 2006)

[86] *Sault Area Hospitals v. OPSEU Local 620* [2001] OLAA (Saltman).

discipline. However, as in any form of workplace misconduct, the employer has an obligation to investigate, and to follow progressive discipline. Failure to do so will result in exposure to liability for lost wages and damages.