

# CANADIAN Employment Law Today

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CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS

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## Employer implicated in fatal crash

*Parents of children killed by truck driver say employer should have known he was a risk*

| BY JEFFREY R. SMITH |

A CALGARY CONSTRUCTION company is being sued by the families of five people killed by one of its truck drivers after the driver was convicted of manslaughter.

On Dec. 7, 2007, Daniel Tschetter, 51, a truck driver for C & J Construction, drove his cement truck into the back of a car stopped at a red light. The accident killed five people in the car, including three children aged 9, 6 and 16 months. Witnesses said Tschetter had been driving recklessly for several kilometres before the crash, including passing a tanker truck on the left shoulder of the road that caused other drivers to get out of the way. In his trial, Tschetter admitted he had been angry and frustrated over delays at the construction site from which he was returning that day.

After Tschetter was convicted and sentenced to six years in jail, the surviving parents of the children killed filed a civil lawsuit against both Tschetter and C & J Construction for more than \$3.5 million.

### Employer should have known risk: Parents

The statement of claim for the lawsuit, which was filed Oct. 19 and has yet to be proven in court, claimed the construction company should have known Tschetter posed a risk on the road. The statement said Tschetter had "an extensive record of past traffic infractions,"

including 20 previous convictions for traffic offences, and he was an alcoholic who had been fired from a previous job as a cement truck driver after being involved in another accident. The lawsuit claimed C & J was liable because it was aware of this information and didn't take it into account when it hired him.

The lawsuit also claimed the company was implicit in supplying Tschetter with alcohol and allowing him to transport it in the company truck. It was reported in the trial that after the crash, Tschetter took a drink from a vodka bottle and threw it into the hopper of the truck in an attempt to destroy it.

C & J's owner said Tschetter was one of its better drivers and though the company knew of his alcohol issues, he didn't drink while working. However, he admitted that sometimes construction companies exchanged gifts of alcohol with cement plant staff, which may have been why Tschetter had alcohol in the truck with him.

"C & J knew or ought to have known that for a recovering alcoholic, this would pose a particular temptation," the statement of claim said.

The civil lawsuit implicating C & J is not surprising, since Alberta's Traffic Safety Act automatically attributes statutory liability in a vehicle accident to the registered owner of the vehicle, says

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## RBC financial planner didn't plan to do a good job

THE POOR job performance of a short-term employee was just cause for a Toronto bank to fire him, the Canada Arbitration Board has ruled.

Keith D'Sylva was hired as a financial planner by the Royal Bank of Canada (RBC) in Toronto in June 2006. His job entailed keeping a book of business, or group of customers, who have investments with the bank. As part of his duties, he was expected to contact each customer at least once a year and try to increase their business with the bank. RBC expected its financial planners to increase the value of their books by about 10 per cent each year.

When D'Sylva started his job, he inherited a book of business that was very successful, usually in the top 10 per cent in Canada as it consisted of mostly wealthy customers in Toronto. However, to maintain this success

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## **HARASSMENT: Complaints about company president**

**Question:** The president of our company looks over the shoulder of employees every day. He has yelled at the office manager, berated her in front of staff and undermined her authority. The office manager has written three letters to the Board of Directors but nothing has been done. Other staff members are starting to complain as well. What steps should the board take to deal with this situation? What liability could arise if the Board does nothing?

**Answer:** Members of a board of directors have fiduciary obligations, which include acting honestly and in good faith in the best interests of the organization. It can be challenging for a board to deal with complaints about the president's behaviour or work performance. The board's role is usually one of governance. Ordinarily, board members should avoid getting involved in issues pertaining to the day-to-day running of the business, including human resources matters.

However, the failure by a board of directors to deal with improper behaviour by the organization's president can have significant negative consequences. Morale and productivity are bound to decline, and this will typically lead to such things as missed targets, poor financial results, the departure of valuable personnel, union organizing and declines in reputation and market share.

Legal liabilities can also arise if a president behaves improperly. In this situation, the office manager may have grounds to claim she has been constructively dismissed because the president has made her continued employment untenable. Other staff members may have grounds for similar claims, depending on how pervasive the problem is. More serious forms of executive misconduct could expose an organization to tort claims, aggravated and punitive damages, human rights complaints and even occupational health and safety liabilities.

Board members must be careful not to involve themselves in every complaint by disgruntled employees. In most cases, these issues should be dealt with by the organization's management and human resources department. Where the board has grounds to believe there has been improper conduct by the president, however, action should be taken.

In some situations, initiating a performance evaluation may be the best way to get to the bottom of performance or behaviour concerns. There should be a mechanism in place for the periodic evaluation of the organization's president. If one does not exist, complaints about the president may provide a good reason to design one. A properly conducted evaluation, involving feedback from a variety of sources, will give the board a much clearer picture of the president's strengths and weaknesses, and provide the ability to communicate expectations and work on improving any identified deficiencies.

Where serious misconduct is alleged, the board may need to take a different approach and commence an investigation. A person or committee delegated by the board would gather information pertaining to the alleged misconduct, and then meet with the president to outline the allegations and obtain the president's response before making any recommendation or decision.

It may turn out the president acted properly and the problems lie elsewhere. If the president is the problem, the board will then be able to take appropriate steps to deal with the matter, through measures such as communicating expectations, providing a warning or, if necessary, parting company.

Directors of an organization can be held personally liable for unpaid wages in certain circumstances in some Canadian jurisdictions — see, for example, section 96 of British Columbia's Employment Standards Act. Otherwise, directors will not usually be liable personally for employment-related acts or omissions, unless a director deliberately acted outside the scope of her authority.

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## **EMPLOYMENT STANDARDS: Terminating employee on sick leave**

**Question:** One of our employees was hurt in a non-work-related accident. She provided a doctor's note stating that her ankle is sprained and went on unpaid sick leave. We don't want her back for a number of reasons, including poor attitude and performance. We are a non-union company, so under our Labour Standards Act, she would be entitled to six weeks' notice or pay in lieu if we terminated her employment. Does she have any other entitlements?

**Answer:** It is important to recognize the provisions contained in employment standards statutes dealing with termination of employment are minimum standards only. An employer may have other statutory, common law and contractual obligations in an employee's dismissal.

Where an employer terminates a non-union employee without cause, it must not only give the employee the notice or severance compensation that is required by the applicable employment standards legislation, but it must also provide the amount of notice or compensation in lieu of notice that is required by the contract of employment. If no written contract exists that deals with termination, the employer will be required at common law to provide reasonable notice of dismissal, or compensation in lieu of notice.

Employers must also be careful to ensure they comply with applicable human rights legislation, which prohibits the employer from dismissing or discriminating against an employee on a

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# Throwing a party? Don't throw away safety

*Employers should keep safety and their own liability as important considerations in holiday party planning*

| BY PETER STRASZYNSKI |

**AS THE HOLIDAY** season approaches, many employers will be planning to host a holiday party for clients, customers or employees. If the function involves alcohol, the employer should take appropriate precautions to ensure that guests do not overindulge or, if they do, they are not permitted to place themselves in a position where they may be a danger to themselves or to others.

## Commercial and social host liability

Courts will make a party host liable for the actions of an intoxicated guest where:

- There is a sufficiently close relationship between the host and the guest.
- There exists a duty of care between the host and the injured party.
- The resulting harm was foreseeable in the circumstances.

It is well-established in Canadian law that commercial hosts — bars, pubs, restaurants and other commercial vendors of alcohol — have an elevated duty to take steps to protect the public from the dangers associated with an intoxicated patron getting behind the wheel. This duty arises out of the commercial host's ability to monitor and curtail consumption, combined with the responsibility to the public associated with its licence to sell alcohol at a profit.

With the 2006 decision of the Supreme Court of Canada in *Childs v. Desormeaux*, it became clear the same duties do not extend to purely social hosts such as hosts of private parties. The court did, however, leave room for exceptional findings of liability against social hosts whose conduct "implicates (them) in the creation or exacerbation of

the risk." If a host actively makes it more likely a guest will become intoxicated, the host may be liable even though it is a social host.

## Employer host liability

An employer does not fall directly into the category of a commercial host or social host. Canadian judges have imposed a duty of care on employers who host parties, based not on a general duty of care to protect the public, but rather on the duty of care owed by employers to their employees to take adequate steps to ensure their safety.


In *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.*, a leading Ontario example, Linda Hunt consumed significant amounts of alcohol at her company's annual holiday party that had an open, un-staffed bar. After she left the party, Hunt stopped by a pub and drank some more, ultimately leaving with a blood-alcohol level more than twice the legal limit. She proceeded to drive a car full of passengers into oncoming traffic, sustaining very serious injuries. She successfully sued her employer, who was found partially responsible. The court found that due to the special employer/employee relationship, Sutton Group was under a positive duty to keep Hunt safe — a duty it did not meet by simply offering her a cab ride or another way to get home.

An employer is not a commercial host. Cases like *Hunt*, however, make it very clear that it would be wise to act like one.

## Precautions

Aside from avoiding alcohol altogether — an option some employers are choosing — here are five suggested pre-

cautions that employers can take to help protect guests and the public from harm and themselves from liability:

- Dedicate or hire servers who will monitor and control consumption and will not be afraid to cut someone off.
- Offer a variety of non-alcoholic drink choices and serve lots of food.
- Be on the lookout for conduct that indicates somebody has had too much to drink, observing guests as they enter, during the party and before they leave.
- Encourage — and, if necessary, require — intoxicated guests to give up their car keys if it appears they may attempt to drive. Designate sober drivers or arrange for taxis to take guests home. Guests could be provided with taxi chits before the party to discourage them from even bringing a car.
- If a guest gets very drunk, keep them under observation until they have sobered up or can be handed over to the care of a responsible person. 

## For more information see:

- *Childs v. Desormeaux*, 2006 CarswellOnt 2710 (S.C.C.).
- *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.*, 2002 CarswellOnt 2604 (Ont. C.A.).

## LIABILITY



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CASE IN POINT: IMMIGRATION

# Immigration history haunts work permit applicant

*Immigrant denied extension of work permit because he knowingly worked without one in the past*

## BACKGROUND

### Foreign worker program changing with times

**CAN THE PAST** immigration history of an applicant be considered a negative factor when he applies for a work permit? This is one of the questions the Federal Court of Canada had to consider in a recent case where an Austrian citizen, who had been in Canada for the majority of the last 21 years, had his request for an extension to his work permit and his wife's visitor status refused.

Because the foreign worker had worked under an expired permit in the past, he was considered unlikely to leave Canada once a new one expired. However, he had never been the subject of a formal inquiry or told to leave Canada.

Immigration lawyer Sergio R. Karas takes a look at how such circumstances are treated in the application process and what else is considered when extensions to permits are evaluated.

| BY SERGIO KARAS |

**GERHARD RONNER**, an Austrian citizen, obtained visitor status for short term stays in Canada on several occasions beginning in the 1980s while he pursued his business of building log cabins in Chilliwack, B.C. During this time, he was reported by immigration authorities for "actively engaging in employment or his business without obtaining an employment authorization," when alleged to be working in Canada. Ronner had applied for permanent residency as an entrepreneur during his stay in Canada, but later withdrew his application. His spouse had accompanied him for the past eight years.

Since 1989, Ronner obtained not only visitor status, but several work permits as a log home builder, with some intervening periods of time where he had no status. There was some disagreement between the parties as to whether or not Ronner was aware he had been reported

for immigration violations twice before in 1990 and 1992. However, he had never been the subject of a formal immigration inquiry, or told to leave Canada, though he did so on several occasions.

### Work permit extension denied

An immigration officer refused to extend Ronner's work permit and his wife's visitor status based on the fact they failed to prove they met the following criteria:

- They would leave Canada by the end of the period authorized for their stay.
- They would not contravene the conditions of entry.
- They were not inadmissible to Canada under the provisions of the Immigration and Refugee Protection Act.

In reaching his conclusion, the officer considered the following factors: the Ronners' travel and identity documents; the reasons for travel to Canada and the reasons for applying for the extensions; their financial means for the extended

stay and return home; the ties to their country of residency including immigration status, employment and family ties; and whether the applicants would be likely to leave Canada at the end of their authorized stay. The officer found that there was no significant benefit to having Ronner remain in Canada under an exemption from a Labour Market Opinion as an entrepreneur, and that he would not likely leave Canada by the end of the authorized stay. In addition, the officer found Ronner's wife did not warrant an extension of her visitor status since she had engaged in unauthorized work in Canada assisting her husband in the business, and the officer did not believe that she would leave Canada by the end of the period authorized.

The Ronners challenged the decision, principally on two grounds. First, they argued the officer made findings and drew adverse inferences based upon materials and rulings which the applicants did not have an opportunity to see and comment upon, breaching procedural fairness. Second, they said the decision was unreasonable and the officer made perverse and arbitrary findings of facts that were not based on the materials before him.

### Worked in Canada previously without a permit

The Minister of Immigration claimed Ronner and his wife were indeed working in Canada and Ronner was aware of his own immigration history of working in Canada without a work permit, being reported twice for immigration viola-

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## CASE IN POINT: IMMIGRATION

# Worker reported twice for immigration violations

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tions and working for four years without a Work Permit after he had already been reported for the same offence. The minister contended that Ronner disregarded immigration laws on more than one occasion and, therefore, the officer's findings were reasonable.

Relying on the 2006 decision of *Toor v. Canada (Minister of Citizenship & Immigration)*, the court found the officer was not required to bring to an applicant's attention adverse conclusions that he may draw from the applicant's evidence. Such obligation will only arise when the adverse conclusions were drawn from material not known to the applicants. The court found the decision was based upon documents and answers provided by the applicants, as well as reports in their immigration record.

While the officer was subject to a duty of fairness including a reasonable opportunity for the applicants to know and respond to information upon which the officer proposes to rely, the scope of that duty will depend on whether the applicants were denied such reasonable opportunity on the factual, administrative and legal context of the decision.

The court relied upon *Chiau v. Canada (Minister of Citizenship & Immigration)*, where the Federal Court of Appeal held that it was well recognized the quantum of the duty of procedural fairness varies according to the context of each situation. In this case, there was considerable evidence Ronner was aware that he had been reported for immigration violations in 1990 and 1992, the officer's notes reflected his dealings with immigration authorities and, therefore, there was a minimal duty of procedural fairness owed in that context.

The court followed the standard of review prescribed by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, which found that the standard of review analysis must be that of reasonableness, but if the standard of review applicable to a particular situation is well settled by past jurisprudence, the court may adopt that standard. In this case, the court found that the prevailing standard of review for the immigration officer's decision was reasonableness, except for the question of procedural fairness, which was subject to correctness. However, having found that no procedural fairness was owed to the applicants by disclosing their prior

immigration dealings, of which they should have been already aware, using the reasonableness standard of review, the applicants could not succeed.

*Ronner* highlights the potential difficulties for work permit applicants who have a negative prior immigration history. One curious fact in this case, is that the applicants appeared to have filed an application for Permanent Residence based on the entrepreneur category, but mysteriously withdrew it. The court gave no indication as to why that application did not proceed. Had the Ronners proceeded with a permanent residence application, it could have been open to the immigration officer to reach a more favorable conclusion with respect to their work permit and visitor status extensions while that application was in the process of adjudication. ■

#### For more information see:

- *Ronner v. Canada (Minister of Citizenship & Immigration)*, 2009 CarswellNat 2384 (F.C.).
- *Toor v. Canada (Minister of Citizenship & Immigration)*, 2006 CarswellNat 1342 (F.C.).
- *Chiau v. Canada (Minister of Citizenship & Immigration)*, 2000 CarswellNat 2930, (Fed. C.A.).
- *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.).

## Temporary work permits in Canada

Anyone who is not a Canadian citizen or a Canadian permanent resident who wants to work in Canada must be authorized by Service Canada. Usually that means getting a temporary work permit for Canada.

Some temporary workers do not need a temporary work permit for Canada. Categories of workers exempted from needing a temporary work permit include diplomats, foreign athletes, clergy and expert witnesses. These exemptions may change at any time, so workers and employers should check with the visa office responsible in their area to confirm that if someone is exempt from a temporary work permit.

Some job categories in Canada have streamlined procedures for applying for a temporary work permit or have different requirements, such as:

- Information technology workers
- Live-in caregivers
- Business people covered by free-trade agreements

Source: Human Resources and Development Canada



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### Sergio R. Karas

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## Regular driving tests and check of driving record good policy

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Laurie Robson, a partner in the Employment and Labour Group of Borden Ladner Gervais in Calgary.

What's to be decided in court is if the employer has additional liability because of anything it did to contribute to the circumstances leading to the accident.

Though Tschetter's past driving infractions would not have shown up on a criminal record check, C & J could have dug deeper because they were related to his job duties. An employer has a duty to ensure an employee has the ability to do a job safely and if it doesn't do an adequate check, it could increase its liability, says Robson.

"An important issue with this case is that anytime an employer puts an employee in a vehicle for work it needs to take reasonable steps to ensure the employee is licensed, has a proper class of licence and ensure the employee can drive it safely on the road," says Robson. "How far to go into their personal life —

to check on driving offences and training for vehicles — is tied to the job duties."

### Employer can't perceive a disability without reason

The fact C & J knew Tschetter had problems with alcohol and it was available through gift exchanges does not necessarily increase the company's liability if it didn't have reason to suspect there was any problem on the job, says Robson. C & J's owner testified that Tschetter was a good driver and he didn't drink while working. Having knowledge of alcohol being exchanged as gifts was not a sufficient reason to mistrust an employee and search for problems without reason — a leap of liability Robson says would be going too far. Assuming that his past problems with alcohol would make him unable to control himself — perceiving him to be disabled without reason — would risk a human rights violation, says Robson.

"Any knowledge that causes reasonable suspicion raises a safety issue, but

the employer doesn't have to turn over every rock to see if something is hiding there," says Robson.

The allegations raised in the lawsuit will be debated extensively in court and the extent of C & J's liability for the accident and the resulting deaths remains to be seen. However, other employers in similar circumstances can reduce their own liability with proper policies, checks and training, says Robson.

When hiring employees who will be operating company vehicles, employers should conduct background checks for driving infractions and driving-related criminal convictions. A driving test for applicants and regular re-testing are also good ideas and are reasonable if they are tied to the job duties from the beginning, says Robson.

"Employers need to look at all of their policies when they put somebody in a potentially dangerous environment (on the road)," says Robson. "What are they doing to ensure the employee is and will continue to be a good and safe driver?" ■

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## ASK AN EXPERT

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number of prohibited grounds.

It is often risky for an employer to dismiss an employee who is on sick leave. In some Canadian jurisdictions, dismissing an employee on sick leave is prohibited by employment standards legislation. Also, the human rights statutes in all Canadian jurisdictions prohibit an employer from discriminating against or dismissing an employee because of a physical or mental disability.

Where an employer terminates an employee who is on sick leave, a human rights complaint is often filed. To defend such a complaint successfully, it will usually be incumbent upon the employer to show that its dismissal decision was not influenced in any way by the fact that the employee was disabled. This is often a difficult burden to meet.

The dismissal of an employee on sick

leave can also expose an employer to additional damages if the employee chooses to pursue an action in court. There are numerous decisions where judges have disapproved of the behaviour of employers who have dismissed ill or disabled employees and have awarded significant damages accordingly.

There are some situations where it is appropriate for an employer to dismiss an employee who is absent on sick or disability leave. For example, if the employee has been off for an extended period, and the medical evidence indicates there is no prospect for recovery in the foreseeable future, the employer may be justified in terminating the employment relationship due to frustration of the employment contract. Another situation would be where the disabled employee's position has been eliminated because of restructuring or downsizing. In such circumstances, however, it will be important to ensure the decision to terminate the employee's employment can be justified

for reasons unrelated to her disability.

In the situation described above, terminating this employee while she is on sick leave is likely to generate a human rights complaint or a wrongful dismissal claim. The better course of action would be to allow the employee to return to work when she provides medical certification that she is fit to do so, and then meet with her to discuss your concerns regarding her performance and behaviour. It will be important to provide specific and supportable examples and the employer's expectations regarding her performance and behaviour moving forward, followed by monitoring her compliance with those expectations. If she fails to meet them, you can then proceed to terminate the employment relationship at an appropriate future time. ■

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## MORE CASES

COMPILED BY JEFFREY R. SMITH

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required regular contact and follow-up with the clients.

Over the course of D'Sylva's first year with the book, he fell significantly short of his targets. RBC received complaints from some of the customers that D'Sylva was not following up on concerns they had given him but D'Sylva refused to accept any blame for this. RBC gradually learned from other employees and his overall performance that he was disorganized and didn't consistently contact customers. He also left a \$1 million mortgage for a colleague to complete while on vacation but failed to provide the proper documents, which forced the colleague to scramble to get it done in time.

RBC gave D'Sylva leads to potential new business and areas to solidify existing business but he didn't look into them. He also stopped consulting a mentor who had been assigned to help him. In his first active quarter ending in early 2007, D'Sylva's results were 60 per cent of target. In the next two quarters he reached only 46 per cent and nine per cent of target respectively and in his fourth active quarter, with zero sales, RBC told him he must show an improvement by August 2007.

On Aug. 14, 2007, RBC gave D'Sylva a final warning letter that outlined he must improve in five areas and contact all of his customers by Oct. 31.

By the end of October, D'Sylva's sales were still weak. He still had failed to contact 65 out of his 291 customers. He had a performance evaluation that rated him at the lowest level in achievement of responsibilities. D'Sylva said he would improve in the coming year as he had been getting used to the book of customers and the transition had made it difficult to grow sales.

However, RBC felt it was unlikely he would improve at this point and terminated him on Nov. 22, 2007, for failing to meet the requirements of his position despite "ongoing corrective action." D'Sylva said it was unfair to dismiss him

because he took over at a time of low growth potential and needed more time to be properly evaluated. He also argued there were no issues of misconduct so termination was too harsh.

The board found D'Sylva knew from the moment of hiring that he was expected to increase the value of his book of business by 10 per cent, which was the same for all financial planners. His results did not just miss this target, but fell well below consistently. He was also given opportunities to improve, but didn't take advantage of them.

Because of his failure to co-operate with RBC's efforts to improve his results nor make more of an effort himself, the board found there was little prospect for improvement, despite D'Sylva's claims. Since there had been no improvement in more than year, the bank made a fair assessment that he couldn't do the job effectively and his dismissal was just.

"I accept Mr. D'Sylva's point that the bank could have given him more time to improve, but I find that RBC was under no obligation to do so," said the board. See *D'Sylva v. Royal Bank*, 2009 CarswellNat 3105 (Can. Arb. Bd.).

### EMPLOYMENT STANDARDS: Employer cuts dental benefits to worker on maternity leave

**AN ONTARIO COMPANY** violated employment standards when it stopped paying the premiums for an employee according to a new benefits agreement that came into effect while the employee was on parental leave, the Ontario Arbitration Board has ruled.

Laura Harris was a lab technician for Jungbunzlauer Canada, a manufacturer of biodegradable ingredients for the food, beverage, pharmaceutical and cosmetic industries, in Port Colborne, Ont. Harris was part of an employee dental plan for which Jungbunzlauer paid the premiums.

In September 2007, Harris went on maternity and parental leave, which would keep her off work for one year. Soon after she left, Jungbunzlauer nego-

tiated a new dental benefit. The collective agreement specified that the company would contribute 32 cents per hour worked for each employee to the union's Trusteed Dental Fund, beginning in January 2008. Harris was not aware of the new agreement.

In February 2008, Harris had a dental appointment and submitted a claim to the company benefits provider. She was denied the benefit and told Jungbunzlauer had not made any premium payments on her behalf in 2008.

The union filed a grievance, accusing Jungbunzlauer of violating the collective agreement and the Ontario Employment Standards Act, 2000 (ESA), by discontinuing payments to the dental fund when she went on leave. The employer argued it met its obligations under both entities, saying it contributed 32 cents per hour for all hours paid to employees as specified under the collective agreement. It said it had no obligation to make any contribution for Harris because she didn't have any paid hours in 2008. It also argued it didn't violate the ESA because all employees were eligible to participate in the dental fund.

The board agreed that the terms of the collective agreement didn't obligate Jungbunzlauer to pay dental premiums for Harris while she was on leave because it was tied to hours worked. However, it found the ESA was intended to "provide statutory protection for continued participation in certain enumerated benefit plans," including dental plans. When the employer stopped making contributions on Harris' behalf, it prevented her from continuing to participate in the dental benefit plan, which violated the ESA's protection for employees on parental leave.

The board also found parties to a collective agreement cannot bargain out of legislated minimum employment standards, so the ESA over-ruled the collective agreement. Therefore, it ruled Jungbunzlauer should have continued the dental benefit premium payments for Harris and remitted the matter for the union and the employer to reach a settlement. See *Jungbunzlauer Canada Inc. v. U.F.C.W., Local 175*, 2009 CarswellOnt 6195 (Ont. Arb. Bd.). ■

# Jail sets free employee for stalking ex

**THIS INSTALMENT** of You Make the Call features a corrections officer who was fired after being charged with stalking his ex-girlfriend.

Mark Keating was an Operational Manager at the Windsor Jail and had been employed with the Ontario Ministry of Community Safety and Correctional Services for 22 years. He was responsible for supervising correctional officers at the jail.

Keating had a discipline-free employment for several years and received positive performance reviews until March 2002, when he was suspended for three



**You make the call**

- Was Keating's misconduct towards his ex-girlfriend and in the investigation worthy of dismissal?
- OR
- Was the misconduct not related to his job and not deserving of dismissal?

days without pay after showing a pornographic video that had been emailed to him to two female officers. In September 2003, he was suspended for 10 days for a reprisal against a female officer who had made a harassment complaint against him. Another 10-day suspension came in January 2004 related to policy breaches.

In 2004 and 2005, Keating was in an on-again, off-again relationship. Things were not going well on July 1, 2005, when he parked his car on the street near the woman's home around midnight and used binoculars to look at her house. He watched her leave to go to work — she didn't work for the ministry — and a neighbor, who had noticed him sitting there for a while, called police. Keating was charged and a story appeared in the newspaper saying that he was a ministry employee who had a history of sexual harassment complaints against him.

The ministry suspended Keating while it investigated the matter. Keating, on the advice of his lawyer, refused to answer questions related to the criminal charges other than basic information.

The ministry decided to discharge Keating for breach of trust necessary for his position, bringing disrespect to the ministry, violating the policy of staff conduct and failing to co-operate with the investigation, as required under correctional services legislation for security-related investigations.

Keating was eventually acquitted of the charges and filed a grievance, claiming he should not have been dismissed for an incident unrelated to the workplace. He also claimed the investigation was not security-related but rather a human resources issue and he was not obligated to answer any questions related to the police investigation.

**IF YOU SAID** dismissal was too harsh, you're right. The arbitrator found the investigation was appropriate, given the concerns the charges raised over his responsibilities. However, she found the ministry had the information it needed and any further answers from Keating would have just been an opportunity to give his side of the story.

The evidence related to the spying incident showed Keating had watched her house and remained some distance away so his ex-girlfriend didn't know he was there. He said he had wanted to determine if she was working a midnight shift so he would know when to talk to her the next day. The arbitrator found this to be a likely explanation, further evidenced by the dropped charges.

The arbitrator found Keating's intentions and the minimal affect on the subject mitigated his misconduct. However, his position and the publicity afterwards increased its seriousness.

The risk of a criminal conviction was also of concern, since it would negatively impact Keating's ability to deal with inmates and staff, particularly after his previous suspensions, the arbitrator found.

The arbitrator ruled Keating's misconduct was serious enough to warrant discipline but not dismissal, particularly considering he had 19 years of service before his first suspension. The arbitrator determined a 15-day unpaid suspension would be in the spirit of progressive discipline. The ministry was ordered to reinstate Keating and compensate him for lost income. See *Keating v. Ontario (Ministry of Community Safety & Correctional Services, 2009 CarswellOnt 6211 (Ont. Pub. Service Grievance Bd.)*. ■

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