
**THE 2009 ANNUAL
CHURCH & CHARITY LAW™ SEMINAR**

Toronto – November 10, 2009

**Essential Employment Law Update
for Charities**

By Barry W. Kwasniewski, B.A., LL.B.

© 2009 Carters Professional Corporation

CARTERS™.ca

Carters Professional Corporation / Société professionnelle Carters
Barristers, Solicitors & Trade-mark Agents / Avocats et agents de marques de commerce

Ottawa (613) 235-4774
Mississauga (905) 306-2791
Orangeville (519) 942-0001

Toll Free: 1-877-942-0001

www.charitylaw.ca™

The 2009 Annual
CHURCH & CHARITY LAW™ SEMINAR
Toronto – November 10, 2009

Essential Employment Law Update
for Charities

By Barry W. Kwasniewski, B.A., LL.B.
© 2009 Carters Professional Corporation



Carters Professional Corporation / Società professionale Carters
Strutture, Staffieri & Tradizionali-Agrate / Ammalu di legge di omogeneità economica

Ottawa, Mississauga, Orangeville
Toll Free: 1-877-942-0001

www.charitylaw.ca
www.carters.ca

A. OUTLINE

- Legislative Changes of Relevance to Employers
- Case Law Update

B. BILL 118 (ONTARIO)

- *An Act to amend the Highway Traffic Act to prohibit the use of devices with display screens and hand-held communication and entertainment devices and the amend the Public Vehicles Act with respect to car pool vehicles*

- **Bill 118 amends the *Highway Traffic Act* to prohibit:**
 - **Driving a motor vehicle while the display screen of a television, computer or other device is visible to the driver**
 - **Driving a motor vehicle while holding or using a hand-held wireless communication device or electronic entertainment device**

4

- **The new law makes it illegal for drivers to talk, text, type, dial or email using hand-held cell phones and other hand-held communications and entertainment devices**
- **Rationale:**
 - **Studies show that a driver using a cell phone is 4 times more likely to be in an accident than a driver focused on the road**
 - **Other studies show that texting while driving is even more dangerous**

5

- **Bill 118 took effect on October 26, 2009**
- **Police will begin issuing tickets on February 1, 2010**
- **Offenders can face fines of up to \$500**
- **The new law is a concern for any employer whose employees use a mobile device or drive a vehicle as part of their job**

6

C. DISPLAY SCREENS UNDER BILL 118

- **Exceptions:**
 - GPS devices
 - Hand-held wireless communication devices
 - Commercially used logistical transportation tracking systems
 - Collision avoidance systems
 - Instrument, gauges and systems providing information to the driver regarding the status of the vehicle

D. HAND-HELD DEVICES UNDER BILL 118

- **Exceptions:**
 - Prohibition does not apply if device is used to call 911
 - Prohibition does not apply if the vehicle is pulled off the road, stopped and not impeding traffic

- **Wireless communication devices may be used in a “hands-free” manner**
 - Example: A cell phone with an earpiece or headset using voice dialling
 - Driver are permitted to press a button to answer or end a call if hands-free technology is being used

E. POTENTIAL LIABILITY FOR EMPLOYERS UNDER BILL 118

- Employers may be found liable for damages if an employee causes an accident while using a hand-held communication device during the course of their employment
- Recent American examples illustrate the potential issues that could be faced by Canadian employers

10

- In Pennsylvania, an investment firm settled a negligence suit for \$500,000 after an employee stockbroker hit and killed a motorcyclist while conducting business on his cell phone
- In Florida, a Miami jury awarded \$21 million to a woman who was severely injured by one of the company's salesmen while he was talking on his cell phone
- In Arkansas a jury found a lumber company liable after one of their employees struck another car, gravely injuring the passenger. At the time of the accident the employee was using the cell phone for a sales call. The case ended up being settled for \$16 million

11

- Plaintiffs have been suing under these theories of liability:
 - The employer requires or encourages employees to be available to clients at all times and either provides cell phones or reimburses employees for use of their personal items; or
 - The employer knows that employees are using phones while driving and fails to ensure that they are doing so safely

12

- **Recommendations:**
 - **Take a proactive approach to the new law. Do not assume that employees will make the necessary adjustments**
 - **Create or update mobile device use policies to make sure that employees comply with the law and carry out their jobs in a safe manner**
 - **Make sure employees are aware of the law and enforce policy violations**

13

F. PAID LEAVE FOR RELIGIOUS OBSERVANCE

- *Canadian Union of Public Employees, Local 4400, Unit B v. Toronto District School Board (Bashari Grievance), [2008] O.L.A.A. NO. 692*
 - **Teacher requested paid leave in order to observe Jewish holidays, request was denied by school board**
 - **Teacher and union brought grievance alleging entitlement to paid leave for religious observance**

14

- **The grievor alleged that the employer’s failure to pay wages for days taken off for religious observance by non-Christians is a breach of sections 5 and 11 of the *Ontario Human Rights Code***
- **Section 5 of the Code operates to provide that every person has a right to equal treatment in employment, without discrimination on the basis of religion**
- **Section 11 provides the right to be free of discrimination, where an employer practice results in an exclusion, restriction or preference on the basis of religious belief**

15

- Non-Christian employees are disadvantaged in comparison with Christian employees. Christian employees have their religious observance days free from work and do not have to suffer a wage loss
- The employer’s practice is prima facie discriminatory against non-Christians. Therefore, the employer must demonstrate that it has accommodated the employee to the point of undue hardship
- In this case, there was noting further the employer could do to accommodate the grievor. The employee is not entitled to be paid wages without providing labour
- The grievance was dismissed

16

- *Markovic v. Autocom Manufacturing*, [2008] O.H.R.T.D. No. 62
 - Employee filed a human rights complaint alleging that the employer discriminated against him on the basis of his creed by failing to provide him with paid leave to observe Eastern Orthodox Christmas
 - The Ontario Human Rights Commission argued on behalf of the employee that two days of paid leave, mirroring the paid statutory holidays of Christmas Day and Good Friday, should be included in the “menu of options” available to employees of minority faiths

17

- The Tribunal found that there is no general principle that employers must pay employees for time off for religious observances
- The duty to accommodate co-exists with the essential employment bargain – the exchange of services for pay. An employer is not required to pay wages when no service is provided in exchange.
- The employer meets their duty to accommodate by providing options for scheduling changes that do not result in a loss of pay

18

G. WHAT THE *Bashari* AND *Markovic* DECISIONS MEAN FOR EMPLOYERS

- An employer is not obliged to provide paid leave for religious observance, but an employer must accommodate the employee to the point of undue hardship
- Meaning, where possible, employers are obliged to reconfigure work assignments and schedules, but do not have to go as far as offering paid leave

19

• Options include:

- Making up time when the employee was not otherwise schedules to work
- Working on a secular holiday, subject to the *Employment Standards Act, 2000* when the facility was in operation
- Arranging to switch shifts with another employee
- Adjusting the employee’s shift schedule where possible

20

H. EMPLOYMENT CONTRACTS

- *Rejdak v. Fight Network Inc.*, 2008 CanLII 37909 (ON S.C.); 67 C.C.E.L. (3d) 309
 - The Plaintiff was offered and accepted a position during a phone conversation with the employer on a Friday night during which the parties agreed to his job title, salary and start date
 - The Plaintiff resigned from his old job and started work with the employer on Monday morning

21

– On Monday the Plaintiff was presented with a written employment contract, which he signed and returned on Tuesday

– The written contract contained additional terms, including a probationary period

– The employer terminated the Plaintiff’s employment without notice prior to the end of the probationary period, as provided for in the written contract

– The court found that the parties entered into an oral contract during the phone conversation, which included no mention of a probationary period

22

– The written contract did not supersede the oral contract and was of no force and effect, because the Plaintiff had no choice but to sign it and did not receive any fresh consideration

– The employer could not rely on the probationary period in the written contract and the Plaintiff was entitled to four months’ compensation in lieu of reasonable notice

23

I. WHAT *Rejduk* MEANS FOR EMPLOYERS

- Employers should have new employees sign a written employment contract before starting work
- Otherwise, employers run the risk that the terms of the written contract may be unenforceable
- Fresh consideration must be provided to an employee in order to vary the terms of a previous oral agreement

24

J. TERMINATION CLAUSES

- *Clarke v. Insight Components*, [2008] O.J. No. 5025

- This case was an appeal of a trial judge’s ruling that an employee’s entitlement to damages was limited to the minimum required by the *Employment Standards Act, 2000* on the basis of a termination clause incorporated into a written memorandum signed by the employee

25

“Termination of Employment – Your employment may be terminated for cause at any time in which event you shall be entitled to only the amount of your salary and vacation pay earned up to the effective date of termination. Your employment may be terminated without cause for any reason upon the provision of reasonable notice equal to the requirements of the applicable employment or labour standards legislation. By signing below, you agree that upon the receipt of your entitlements in accordance with this legislation, no further amounts will be due and payable to you whether under statute or common law.”

26

- The termination clause is not ambiguous
 - When read in their proper context, the words of the termination clause are clear
- The termination provision is not void at law
 - The termination clause at issue meets the statutory standard set by the *Employment Standards Act, 2000* not a situation where the employer has drafted a clause that attempts to avoid the minimum statutory notice requirements

27

– The termination clause was supported by consideration

- The employer received a significant promotion and signed a written memorandum indicating his agreement to the terms of the position. The enhanced status and remuneration attached to the employee’s new position provided the necessary consideration to support the termination clause
- The employee knew that the termination clause was a necessary part of his employment package, this was not a case where a termination clause was inserted unilaterally by the employer with no countervailing benefit to the employee

28

K. WHAT *Clarke* MEANS FOR EMPLOYERS

- This case provides an example of an enforceable termination clause
- The clause effectively limits the employee’s entitlement to the statutorily required minimum payment. The employer was not responsible for paying any additional common law termination damages
- A termination clause must not provide for less than the statutory minimum termination, and, if applicable, severance payments under the *Employment Standards Act, 2000*. If it does it will not be enforceable and the employee will be entitled to claim common law damages for wrongful termination

29

L. UPDATE ON *Heintz v. Christian Horizons*

- Background
 - Christian Horizons identifies itself as an Evangelical Christian Ministry, that operates over 180 residential homes across Ontario to provide care and support to approximately 1400 individuals with developmental disabilities
 - Connie Heintz, an individual of deep Christian faith worked as a support worker for Christian Horizons for 5 years

30

– Christian Horizons required all new employees, including Ms. Heintz, to sign a Lifestyle and Morality Statement, which prohibited homosexual relationships

– While working for Christian Horizons, Ms. Heintz began to develop awareness of her sexual orientation as a lesbian

– Once Christian Horizons became aware of her sexual orientation, Ms. Heintz was advised that she was not complying with the Statement and was required to leave the organization

31

– The Ontario Human Rights tribunal ruled that Christian Horizons could not require its employees to sign the Lifestyle and Morality Statement

– Although Christian Horizons was found to be a religious organization, its primary object and mission is to provide care and support for individuals with developmental disabilities, without regard to their creed

– Compliance with the Statement was not a reasonable or *bona fide* qualification for employment

32

• The *Christian Horizons* decision is being appealed at the Divisional Court

• The appeal dates are December 15, 16 and 17, 2009

• There are four interveners in the appeal:

- Canadian Council of Christian Charities
- Evangelical Fellowship of Canada
- Ontario Conference of Catholic Bishops
- Equality for Gays and Lesbians Everywhere

33

DISCLAIMER

This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2009 Carters Professional Corporation



Carters Professional Corporation / Société professionnelle Carters
Ottawa, Mississauga, Orangeville

Ottawa, Mississauga, Orangeville
Toll Free: 1-877-942-0001

www.charitylaw.ca
www.carters.ca


