Five Cases You Need To Be Aware Of

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As 2012 draws to a near, it is appropriate and indeed advisable to take a close look at what the courts and tribunals have been doing in the occupational health and safety and legal arena. I have picked five cases that rise above the hundreds that have been decided across Canada this year. These five cases are the subject of my presentation at the Gowlings Annual Workplace Risk Management Year in Review conference and may impact your organization in the future. At least five cases, in the author's view, should be well understood and also the subject of review of your occupational health and safety management system to ensure that you do not fall into some of the traps demonstrated in some of these cases.

1. *R. v. Larry Argue et al*

Larry Argue was the structural engineer retained by Alan

Grinham to work on behalf of a consultant for an Ontario municipality regarding the construction of a washroom facility and change room in a public sports field. Several years after the design and construction of the facilities, a 14-year-old school girl hopped up on a change table, causing an unsecured privacy wall to collapse with fatal results.

The Ministry of Labour prosecuted the municipality, the architect and the engineer. In a pre-trial motion, all three defendants argued that the charges had been laid in excess of 12 months beyond the design and construction of the facility. The defendants all argued that the offences were limited to a point in time, that the time limit for laying charges had expired before the fatal accident occurred and that they were all beyond the reach of the Ministry of Labour for prosecution under the *Occupational Health and Safety Act* (*OHSA*).

Justice Epstein held that the engineer and the architect indeed could rely upon a statute of limitations defence. He accepted that the role of the architect and the engineer under the *OHSA* was a discrete, point in time involvement of either providing advice or appropriate certification. However, he held that the municipality was under a continuing duty to provide a safe workplace, to both workers and members of the public, such as the fatally injured school girl, and the charges were not dismissed against the municipality. This case is a dire warning for all employers who have duties not only to workers but to members of the public as well.

2. *R v. Town of Meaford Fire Department*

The Fire Service of Ontario, and across Canada for that matter, have had to walk a tightrope trying to meet public expectations that they perform heroic emergency services while maintaining high standards of occupational health and safety. This tension was clear in the decision of Justice Stinson, when he acquitted the Town of Meaford Fire Department from charges under the *OHSA*.

The charges arose from an incident where the volunteer fire department responded to a fire in an apartment above a local restaurant very early one morning. The fire department responded, using appropriate tactics including an interior search and seizure. In the course of that rescue attempt, the self-contained breathing apparatus of one firefighter malfunctioned and although extricated from the burning building, both firefighters suffered smoke inhalation.

The Ministry of Labour prosecuted the Town of Meaford Fire Department. The court acknowledged that a standard of perfection regarding worker safety is unfair and contrary to the public interest. On the other hand, some of the obiter dictum suggests that if a fire department does not follow its own internal standard operating guidelines and provincial guidelines, it may find itself at the wrong end of a prosecution and be convicted.

3. *Investia Financial Services*

The Bill 168 amendments to the *OHSA* required certain violence and harassment policies, procedures and training to take place effective June 15, 2010. An employee dismissed for insubordination brought a reprisal complaint to the Ontario Labour Relations Board (OLRB), on the basis that he had been dismissed for exercising his right to complain about harassment in the workplace.

In a very important decision, the OLRB held that the two primary purposes of the Bill 168 amendments were to first create a workplace harassment policy and program, and second to provide workers with information and instruction as appropriate for their particular workplace. The OLRB was not persuaded in this case that there was a general duty on the part of employers to prevent harassment of employees by other employees under Bill 168. The OLRB also went on to hold that this case, even if the board did exercise jurisdiction to hear and decide it, failed on its merits.

This decision of the OLRB has set the standard for minimal rights on the part of workers to attack employers' decisions to discipline up to and including discharge, if there is a credible answer by the employer relating to insubordination. Bill 168 cannot be used as a 'cure all' for disgruntled employees to seek reinstatement under s. 50 of the *OHSA*.

4. *Garda and Teamsters Decision*

The Garda decision involving a work refusal grievance is an important reminder of work refusal procedures to be followed by employers. In this arbitration decision, a security guard working for Garda complained that his bulletproof vest zipper was torn and it could not be used safely. The worker's supervisor provided the grievor with a vest from a 'used part-time pool'; however the grievor refused to use this replacement equipment citing hygienic and fit reasons. The grievor, however, did offer to accept work that did not require the use of a bulletproof vest. That solution was not acceptable to management and the grievor was sent home and lost pay for an eight-hour shift.

Upon being grieved, the arbitrator held that the employer did not follow the fairly clear and well established process of a work refusal. Section 43 of the *OHSA* in Ontario requires that if there is a continuing work refusal, a Ministry of Labour inspector must be called in to determine if the circumstances under which the worker has been directed to work constitute 'likelihood of endangerment of the worker.' Since the second stage investigation involving the Ministry of Labour was not complied with, the employer failed to respect the process set out in the *OHSA*. As a result, the grievor was awarded eight hours of back pay.

This case is a stark reminder to employers that they, and their first line management, must be very familiar with the work refusal process and the right of a worker to refuse to do unsafe work, even if the employer disagrees with the basis

upon which the worker refuses to do the work. [For more information on work refusals, including how to ensure supervisors properly handle them, see the OHS Insider's Work Refusals Compliance Centre.]

5. *R. v. Metron Construction and Joel Swartz*

This case almost needs no introduction since it flows from the events that occurred on Christmas Eve 2009. Four workers died when two swing-stage scaffolds broke apart, and only two of the six workers on the scaffold had safety lines and did not fall to their death. Both the president of the company, Mr. Swartz, and his single director corporation, Metron Construction, were charged with both *OHSA* and criminal negligence causing death and bodily injury charges.

Ultimately, partway through a criminal preliminary inquiry, there was a resolution such that the president pleaded guilty to four counts of violating the *OHSA*, and his corporation pleaded guilty to criminal charges under the Bill C-45 amendments to the Criminal Code.

Although there has been much criticism of the fine against the company only amounting to $200,000.00, His Honour Judge Bigelow, a very experienced and capable trial judge, held that to impose a higher fine would essentially result in the bankruptcy of the company and also ignore a number of the mitigating factors in the corporate defendant's favour.

The real lesson of Metron Construction, apart from the criminal prosecutions and charges against the director and president of the company, is that life is precious, safety systems must be implemented, and focus on workplace safety is always a good business decision. Otherwise, lives may be lost or ruined and business reputations irreparably damaged.

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