

***EMPLOYMENT STANDARDS ACT: NEW MEASURES
TO ATTACK COMPLAINTS BACKLOG (AND
OTHER DEVELOPMENTS)***

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INTRODUCTION¹

This paper will deal with recent developments related to the Ontario *Employment Standards Act, 2000* (the “*ESA*”).

First, recent amendments to the *ESA* aimed at encouraging the internal resolution or early settlement of *ESA* issues will help employers deal with claims regarding overtime, vacation pay, public holiday pay, unpaid wages etc. with greater expediency and less expense.

Second, a recent court decision made headlines for its \$25,000 judgment against an employer for wrongful dismissal: while the employer had “just cause” for termination by common law standards, the court found that the higher threshold for “wilful misconduct” under the *ESA* was not met and a \$25,000 award for wrongful dismissal was issued.

AMENDMENTS TO THE EMPLOYMENT STANDARDS ACT

On January 19th, 2011, the *Open for Business Act, 2010* was implemented. This Act amended the *ESA* by introducing several new provisions designed to promote the early settlement of claims without the direct involvement of the Employment Standards Branch. The Ministry of Labour anticipates that the new settlement process will reduce the backlog of claims that has occurred as a result of the current *ESA* complaints system.

Under the former system, an employee could file a complaint against his or her employer with the Director of Employment Standards and an Employment Standards Officer (“*ESO*”) would be assigned to investigate the matter and render a decision. The *ESO* would typically demand of the employer whatever materials were considered necessary, such as the employer’s employment and payroll records, to determine whether an employee’s claim had merit.

PRE-COMPLAINT REQUIREMENTS

One of the most significant changes is the introduction of section 96.1 which now requires that an employee, prior to the filing of a complaint, first inform his or her employer that they perceive a violation of the *ESA* to have occurred. When filing a complaint with the Director, or at the latest, within six months of filing a complaint, the employee must

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indicate in writing what information the employer was given, what manner it was provided in, and what response was received.

Although this requirement has a built-in discretionary exception (subsection 96.1(2) states that the Director can assign a complaint to an ESO even if this procedure has not been followed), the expectation of the new provisions seems to be that in most cases, as per sub-section 96.1(4), this requirement must be met within six months of the filing a complaint. Failure to abide by this rule without authorization under the discretionary exception provision can result in the claim being denied under section 96.1(5).

The text of the new provisions is included below:

Steps required before complaint assigned

96.1 (1) The Director shall not assign a complaint to an employment standards officer for investigation unless the complainant has taken the steps specified by the Director to facilitate the investigation of the complaint.

Exception

(2) Despite subsection (1), the Director may assign a complaint to an employment standards officer for investigation even though the complainant has not taken the specified steps.

Same

(3) Without restricting the generality of subsection (1), the Director may specify that,

(a) the complainant shall inform the employer of the basis for his or her view that this Act has been or is being contravened and, if he or she is of the view that wages are owed, the amount of the wages;

(b) the complainant shall indicate to the Director in writing what information was given to the employer under clause (a), the manner in which it was given and the response, if any, that the employer gave; and

(c) the complainant shall give the Director such evidence and other information in writing as the Director considers appropriate for assigning the complaint to an employment standards officer for investigation.

Where steps not taken

(4) If the Director determines that a complainant has not taken the specified steps, the Director shall inform the complainant that the complaint has not been assigned to an employment standards officer for investigation.

Deemed refusal

(5) If a complainant has been informed that his or her complaint has not been assigned to an employment standards officer and the complainant has not taken the specified steps within a period of six months after the complaint was filed, an employment standards officer shall be deemed to have refused to issue an order and to have served a letter on the complainant advising him or her of the refusal on the last day of the six-month period.

OPTIONAL MEDIATION

Of equal importance, the new amendments also empower ESOs to settle complaints through mediation if both parties agree to the settlement process. Where the process is agreed to, the terms of settlement reached by the parties are binding:

Settlement by employment standards officer

101.1 (1) An employment standards officer assigned to investigate a complaint may attempt to effect a settlement.

Effect of settlement

(2) If the employer and employee agree to a settlement under this section and do what they agreed to do under it,

- (a) the settlement is binding on them;
- (b) the complaint is deemed to have been withdrawn;
- (c) the investigation is terminated; and
- (d) any proceeding respecting the contravention alleged in the complaint, other than a prosecution, is terminated.

IMPACT OF AMENDMENTS

Delay due to backlog was a significant problem under the old system, as employee claims would routinely be addressed many months, and even years after the events occurred, making it difficult for employers to gather documents and the other necessary evidence to defend their positions.

Prior to the new amendments, employees had no obligation to discuss claims with their employers before filing complaints with the Ministry of Labour. The new provisions are intended to prevent a future backlog of claims by ensuring employers are made aware of complaints and given the opportunity to resolve them without the costs and wait times associated with formal claims filed by employees with the *ESA* Branch.

By requiring this communication at the earliest stage, the new rules can help save employers the hassle and cost that can be associated with retaining counsel to address formal *ESA* complaints.

The option of mediation is also an important development, as it can help bring to an early close what could otherwise be a protracted dispute. The change is also a return to the process of several years ago, where *ESA* Fact Finders were allowed, and even encouraged, to play an active role in the resolution of disputes.

REMINDER TO EMPLOYERS – JUST CAUSE: *ESA* V. COMMON LAW

A recent wrongful dismissal decision, *Oosterbosh v. FAG Aerospace Inc.*, 2011 ONSC 1538 (“*Oosterbosh*”) made headlines for its \$25,000 judgment in the employee’s favour. This ruling serves as reminder that the threshold for disentitling employees from termination and severance pay is higher under the *ESA* than it is in the common law.

In *Oosterbosh*, Haines J. determined that just cause, as it is understood by common law jurisprudence, had been met when the employer terminated the plaintiff. At common law, just cause for the termination of employment requires proof of misconduct constituting a repudiation of the employment relationship². The *ESA* threshold for disentitling employees to termination and severance pay, however, is more stringent.

Subsections 2(1) and 9(1) of Regulation 288/01 to the *ESA* state that under the *ESA*, employees will only be disentitled from termination and severance pay if are guilty of “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer”:

Employees not entitled to notice of termination or termination pay

2. (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:

[...]

3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

Employees not entitled to severance pay

9. (1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

[...]

6. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

² *McNaughton v. Sears Canada Ltd.* (1997) 144 DLR (4th) 47 at para. 11; *McKinley v. BC Tel* [2001] 2 SCR 161 at para. 48.

In *Oosterbosh*, the plaintiff, a machine operator manufacturing aerospace components, was continually late for work and produced defective products on an ongoing basis. The plaintiff was eventually dismissed pursuant to a progressive discipline policy that included written warnings and coaching sessions as well as a two-day suspension. No improvement was seen following these disciplinary actions. Haines J. found that the plaintiff “demonstrated a sustained course of casual and careless conduct that was inconsistent with the continuation of his employment”; however, the plaintiff’s conduct was not found to have been “wilful” such that he would be disentitled from termination and severance pay under the *ESA*.

As a result, employers should be mindful that though they may terminate employees for just cause, termination and severance pay may still be awarded under the *ESA* unless “wilful misconduct, disobedience or wilful neglect of duty” by the employee can be demonstrated. It is important to know and understand this distinction so that non-unionized employers can fully understand the liability that a termination can attract if litigation ensues.

PRACTICAL TIPS FOR EMPLOYERS

- The first contact an employee makes with the company respecting an *ESA* issue (usually a claim for something like unpaid wages, vacation pay, overtime etc.) is the best and least expensive time to resolve disputes.
- If the company and the employee are unable to solve these disputes on their own, consider taking advantage of the new settlement mechanisms available under the *ESA* to try to bring an early end to the issue.
- When an *ESA* dispute is successfully resolved at the early stage of a complaint, be sure to get a release signed that protects the company from future claims from that employee.
- When your company first hears of a potential *ESA* complaint, take the time to evaluate the way the company operates to ensure compliance with the legislation and avoid any continuing violations and liability on a going forward basis.
- Keep in mind the *ESA* threshold for termination without pay: only where employees are guilty of “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned

by the employer” will an employer not owe termination and severance pay. Be sure your company’s decision-making process takes this key consideration into account.