

Rather, the disruption caused by Uber provides Toronto an opportunity to embrace new technology and accept that the old taxicab licensing regime has hailed its last cab. If it fails to do so, Uber and others like it will continue to find ways to disrupt and

dislodge municipal regulatory systems that have outlived their usefulness.

REFERENCES: *Toronto (City) v. Uber Canada Inc.*, 2015 ONSC 3572, 2015 CarswellOnt 10175 (Ont. S.C.J.)

at paras. 69-70; *Highway Traffic Act*, R.S.O. 1990, c H.8; Online, <<http://news.nationalpost.com/toronto/toronto-city-councillor-suggests-uberx-passengers-could-be-fined-up-to-20000-for-using-bandit-taxis>> (accessed August 24, 2015).

### EMPLOYMENT LAW

## Board reinstates employee who drove drunk

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### The Ontario Labour Relations Board ordered the reinstatement of an employee who was charged with drunk driving while operating a company vehicle.

Employers often lament that the standard for a just cause dismissal is too high. The Ontario Labour Relations Board's ("Board") recent decision to reinstate an employee who was charged with drunk driving while operating a company vehicle will do little to change this view.

However, the decision does give employers hope with respect to the types of conditions that may be placed on an employee as part of an employee's return to work.

#### Facts

In *Hydro One Inc. v. LIUNA*, Hydro One Inc. dismissed a senior foreperson for cause after he was charged with drunk driving while operating a company vehicle. During the course of the employee's first seven years of employment, he had not accumulated any discipline; however, following a transfer to northern Ontario, the employee's performance and behaviour began to deteriorate.

At the same time, the employee (who, up until the transfer, characterized himself as a "moderate drinker")

began drinking far more heavily. He estimated that, on average, he was drinking 10 beers and a "mickey" of vodka daily. His drinking often started in the morning, before going to work, and continued late into the evenings.

The employee's erratic behaviour did not go unnoticed. Prior to the drinking and driving incident, the employer met with the employee and asked whether he had any personal issues. While the employee initially downplayed the existence of any significant personal challenges, he subsequently asked his immediate supervisor about accessing the Employee Assistance Program.

#### Arrest and grievance

The employee later went on sick leave for a few weeks. Two days after returning to work from his sick leave, the employee was arrested on impaired driving charges after police received reports of a white Ford with its four-way flashers on, "all over the road" and nearly striking other vehicles.

The employee was put in jail overnight. His vehicle — which the employer later testified was in "disgusting" condition — was impounded. Given the seriousness of the employee's misconduct, the employer terminated the employee's employment for cause.

The union promptly filed a grievance arguing that in terminating the employee's employment, the employer had not sufficiently considered the employee's "extenuating circumstances."

#### Analysis

In the Board's view, while the employee was guilty of serious misconduct, the employer had failed to properly investigate the incident: the employer never met with the employee and/or the union to discuss the incident and, more importantly, it had effectively turned a blind eye to the employee's apparent alcoholism.

#### Causal connection

The Board noted that the case law involving issues of alcohol and drug use has evolved such that employers must now examine an employee's misconduct for a causal connection with an alcohol or drug-related disability. If such a connection exists, the employer must consider whether the employee can be accommodated without undue hardship during or after appropriate treatment.

#### Reinstatement

Based on this analysis, the Board concluded that although the employer had cause to dismiss the employee, given the employee's remorse, coupled with his alcoholism, it was appropriate to substitute the discharge with a lesser penalty. Accordingly, the Board ordered the employee be reinstated without loss of seniority to the role he held.

#### Conditions

Alternatively, if licensing and insurance requirements precluded reinstatement, the employee was to be given a similar or other position. However, the

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employee's reinstatement came with significant strings attached.

As a condition of reinstatement, the Board ordered the employee to submit to an initial blood, liver or similar test to prove the veracity of his claim of abstinence.

Thereafter, the Board ordered the employee to submit to similar tests every 12 months for the next 5 years and, at the employer's election, to be subject to random drug and alcohol testing over the same period. The Board further ordered the employee to continue (or begin) participating in various clinical interventions.

Interestingly, the Board significantly curtailed the employee's privacy rights, ordering that he must provide his employer with the name of his Alcoholics Anonymous sponsor (subject to the sponsor's consent) and

authorize the sponsor to communicate with the employer about the employee's progress (or lack thereof).

The employee was also ordered to provide the employer and the union with his test results, and information on his progress, prognosis and restrictions. If the employee were to fail to comply with any of the conditions or if it were established that the employee had alcohol or non-prescribed prescription medication in his system at work, the employee would be subject to discharge.

### Lessons for employers

Drug and alcohol addiction represents a unique challenge for employers. As addictions and mental health disabilities are often episodic and not visible to the average person, it is often difficult (if not impossible) for

employers to address these disabilities in the way that they would address a physical disability.

However, as this case demonstrates, even absent an employee's disclosure, employers must consider all the surrounding circumstances and assess whether addiction or mental health issues are likely to be at play before embarking on a course of discipline.

Depending on the circumstances, this assessment may require an employer to change its course of action from termination to accommodation.

REFERENCES: *Hydro One Inc. v. LIUNA, Ontario Provincial District Council*, 2014 CarswellOnt 15867, 248 L.A.C. (4th) 235, [2014] O.L.R.B. Rep. 912 (Ont. L.R.B.), varied 2014 CarswellOnt 16338, [2014] O.L.R.B. Rep. 930 (Ont. L.R.B.).

## BRIEFLY SPEAKING

**GENERAL LIABILITY:** Last month, in its decision in *Guindon v. Canada*, the **Supreme Court of Canada** considered the **constitutionality** of an **administrative monetary penalty** ("AMP"). AMPs afford administrative bodies the power to impose **sanctions** for **regulatory contraventions** in the form of a monetary penalty. Parties threatened with such a sanction have challenged the **constitutionality** of AMPs: they claim that such a penalty is tantamount to charging said parties with a **criminal offence** for purposes of **s. 11** of the *Canadian Charter of Rights and Freedoms* and, accordingly, they are entitled to the **due process** requirements under s. 11.

Most of these challenges have been unsuccessful to date; however, none of the challenges had reached the level of the Supreme Court until now. The **AMP** in this case is provided for under **s. 163.2** of the *Income Tax Act* and was imposed on a lawyer who had made **false statements** about the **tax status** of a **charity**. While the **Court of Canada** had agreed that the party in question was entitled to the

**procedural safeguards** under s. 11 of the Charter, the **Federal Court of Appeal** reinstated the AMP.

A **majority** of the **Supreme Court** (4 of 7 judges) held that the AMP in question did **not engage s. 11** of the **Charter** and was therefore **constitutional**. In doing so, the Court demonstrated a **deferential** approach to regulators who require strong AMPs to carry out their duties. Likewise, strong AMPs encourage **compliance** with the regulatory regime. The majority of the Court noted that significant AMPs reflect the fact that such penalties are "not simply considered a **cost of doing business**." Since the AMP in this case has a legitimate **regulatory purpose** — promoting compliance with the tax scheme — the imposition of such was not a "**true penal consequence**." 2015 SCC 41, 2015 CarswellNat 3231, 2015 CarswellNat 3232 (S.C.C.)

The **Supreme Court of Canada** released its highly anticipated, **unanimous decision** in *Chevron Corp. v. Yaiguaje* concerning the recognition

and enforcement of **foreign judgments**. **Forty-seven Ecuadorian residents** had sought the recognition and enforcement of an **Ecuadorian court judgment** in the amount of **US 9.51 billion** rendered against **Chevron Corporation** in the Ontario Superior Court of Justice. The plaintiffs had included **Chevron Canada Limited** as a named defendant.

While the **motion judge** held that the **Court** did have **jurisdiction** to hear the claim, he noted that Chevron Corporation had **no assets** (nor did it conduct business) in Ontario and that there was **no legal basis** on which to **pierce the corporate veil** of Chevron Corporation with respect to Chevron Canada's operation in Ontario.

Accordingly, there was **no prospect** for the claimants' **recovery** in Ontario. The **Court of Appeal for Ontario** upheld the motion judge's decision regarding the Ontario courts' **jurisdiction** over the enforcement action, but **overturned** the motion judge's stay.

The **Supreme Court** dismissed the **appeals of Chevron Corporation**  
*See Briefly Speaking, page 56*