The Apology Act: Court Prevents Terminated Employee from Relying On Employer's Apology

In April of 2009, a little known law called the **Apology Act (the "Act")** entered into force. A very short act, it primarily accomplishes one objective: it precludes parties in civil matters from using an apology made by the other party as evidence of fault or liability. Even the fact of the apology is inadmissible.

The **Act** does have some limitations, in particular, it does not apply to criminal or quasi-criminal matters (such as health and safety and other prosecutions under the **Provincial Offences Act**.)

A recent decision from the Ontario Superior Court of Justice demonstrates that it may apply in straightforward or perhaps interesting ways in employment law.

In **Simaei v Hannaford**, the Court was asked to strike certain pleadings for violating the **Act**, because they referenced an apology that the defendant had given the plaintiff.

The case was described by the Master who adjudicated the motion as having a "lot of heat." As a result, the Master removed the previous version of the pleadings from the public record, and only vaguely referred to them in the decision.

What we can determine is that the wrongful dismissal action involved significant claims for punitive damages as well as damages for libel, and that at some point the plaintiff apologized.

The Master found that as a result of the **Act**, the apology was inadmissible as evidence of liability, and was not properly in the pleadings. In addition, as a result of the decision, the Master found that the plaintiff was not entitled to ask questions about the apology on discovery of the defendant.

Dismissals of long-service employees, particularly where cause is not alleged and the dismissal is the result of business requirements or other circumstances beyond the employer's control, can be difficult and emotional. This case can reassure employers that genuine expressions of sympathy and concern for a dismissed employee are unlikely to be admissible to advance a plaintiff's case.

Unfortunately, the Master's rare decision to remove the apology from the public

record and to provide almost no analysis of the characterization of the apology leaves the case law with a vacuum. It is certainly unusual for the public record to be stricken in this way, particularly when there are no important security concerns or children affected.

As such, it is important to note that the circumstances *surrounding* an apology are not protected by the **Act**. If, in the course of an apology, an employer makes a statement asserting cause or setting out the "reason" for termination, then depending on the circumstances an employer may be precluded from arguing that admission is inadmissible as evidence. For example, if an employer were to phrase a termination in the form of an apology and give an unlawful reason for the termination, as in: "I'm sorry, but you're too feminine for this job so we have to terminate your employment," it seems unlikely that a court would permit the employer to hide behind the Act. That would seem an absurd result. Of course, it could be argued the Act supports exactly that sort of result. Time will tell.

In the meantime, it is advisable for communications with employees at sensitive times like terminations and post-termination, be handled by specific persons with human resources training, preferably with legal advice.

Article by Stringer LLP