Federal Post

Federal Post – Second Edition

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Dear Friends,

We are delighted to bring you this year-end edition of the *Federal Post*, our newsletter designed exclusively for federally regulated employers. In this issue, we cover a range of interesting developments in the areas of federal labour, employment standards, unjust dismissal law and health and safety.

Ian Campbell, a lawyer in our Waterloo Office, provides you with a succinct overview of possible legislative changes that may be coming your way further to the recent election of the Liberal government in Ottawa. The Liberal election platform contained many proposals affecting employment and labour relations issues, ranging from increasing pregnancy/parental leave from 12 to 18 months to the repeal of recent amendments to the *Canada Labour Code* which replaced the federal card-based certification system with secret votes. Stay tuned – we will be closely monitoring and reporting on any legislative developments on this front.

Kathryn Meehan, also of our Waterloo Office, reports on the recent Federal Court of Appeal decision in *Flatt v. Attorney General of Canada*, which considers *Johnstone*, the seminal decision on accommodation of childcare obligations, in a case where an employee requested accommodation for breastfeeding. Kathryn also provides some background information on the issue of accommodating breastfeeding.

George Vuicic of our Ottawa office reviews a Federal Court decision (*Spruce Hollow Heavy Haul Ltd. v. Madill*) which upheld an unjust dismissal adjudicator's award of, among other things, aggravated and punitive damages. The case stands as a critical reminder to employers that adjudicators under the *Canada Labour Code* **will** award these damages as may be appropriate in the individual case.

Finally, Elizabeth Winter of our Toronto office provides a brief overview of *Canada Post Corp v. CUPW* in which the Federal Court upheld a finding that the physical presence of a work place committee and health and safety representatives was required in an onsite investigation to permit them to fulfil their participation requirements under sections 135(7)(e) and 135(6)(g) of the *Canada Labour Code*. Rejecting an argument that the adjudicator was bound by an earlier case that found physical presence during an investigation was not required, the Court held that this decision was reasonable and within a range of possible, defensible outcomes.

As always, we hope you find the information in our *Federal Post* interesting. We'd appreciate any feedback you may have on the newsletter, and please contact us if you have any questions about the issues raised.

Jodi Gallagher Healy

Editor

IN THIS ISSUE

WHAT FEDERAL EMPLOYERS CAN EXPECT FROM THE NEW LIBERAL GOVERNMENT

By Ian S. Campbell

If the new Liberal government introduces, and passes unchanged, its stated agenda for reforming federal employment and labour laws, significant changes are ahead for federally regulated employers.

The Liberal agenda consists of first, changes to employment or labour standards and second, changes that are primarily directed towards unions.

The employment or labour standards changes under discussion include:

- extending pregnancy/parental leaves from 12 to 18 months;
- permitting employees to take time off and return to work intermittently during this 18 month period; and
- putting into place a mechanism for employees to request flexible work arrangements such as different start and end times for work, shorter shifts, working from home for all or part of their work time.

While we will have to wait until draft legislation is released to knows the details, the broad strokes of what is being proposed is reasonably easy to determine.

With respect to the changes to the pregnancy/parental leave provisions, we can expect that employees will be given the right to take up to 18 months' leave of absence following the birth of their child, likely with benefits continued and an absolute right to reinstatement to their position following their leave.

From an employer's perspective, this means having to find someone to replace an employee on leave for 18 rather than the current 12 months. It will also mean dealing with the reintegration into the workforce of someone after what could possibly be an 18 month absence. In today's world, with changes in businesses occurring weekly and sometimes daily, an absence of 18 months could necessitate significant reorientation or possibly retraining before the returning employee is capable of being productive.

A more troubling aspect of the Liberal platform is the commitment to allow employees to take their leave in intermittent periods of time during the 18 months following the birth. Replacing someone who will be continuously absent for an 18 month period is one thing; attempting to accomplish this for someone who will be in and out of the workplace over an 18 month period will be something else. Again, we will have to wait for the legislation to see how this is to work.

The third component of the proposed amendments to the employment or labour standards is giving the employees the right to request flexible work arrangements. So far all we know is that the legislation will be amended to allow employees to make their requests and the employer will be obligated to consider those requests and to respond in writing. It is unclear whether there will be a mechanism in the *Canada Labour Code* ("Code") for employees to contest their employer's denial of requests

for flexible work arrangements.

Even without such a mechanism, employees may be able to challenge their employer's response through the C*anadian Human Rights Act* ("Act") if they assert that these arrangements are necessary to accommodate a protected ground under the Act. Employers will have to carefully consider their written responses to these requests as they may be creating evidence which could support a human rights complaint.

The second part of the Liberal government's agenda is directed at labour unions. According to the Liberal Party's Platform *Real Change: A New Plan for a Strong Middle Class*, these changes are necessary because:

Under Stephen Harper, many of the fundamental labour rights that unions have worked so hard to secure have been rolled back, making it more difficult for workers to organize freely, bargain collectively in good faith, and work in safe environments.

The changes that will impact labour unions are:

- repealing the recent amendments to the Code which replaced the card-based certification system with secret ballot votes; and
- repealing the recent amendments to the *Income Tax Act* which require unions to disclose any expenditures in excess of $5,000 and any salaries more than $100,000.

These changes to the law introduced by the Harper government had been vigorously opposed by trade unions and their repeal is expressly referenced in the Liberal Party's Platform.

With respect to the changes to the union certification process, this will simply roll the clock back to where it had previously been for many years. Unions will be able to obtain certification to represent employees by filing membership cards for 50 plus one of employees in a bargaining unit that is appropriate for collective bargaining. There will be no certification vote by secret ballot unless the union has filed cards for less than a simple majority of the affected employees.

The lack of a secret ballot vote means a very limited opportunity for the employer to persuade its employees that they are better off without a union. In most situations, unions will not apply for certification unless they believe that they have cards for the majority of the employees. As a result, the employer's best and perhaps only opportunity to campaign will be before the certification application is filed. To do so, however, an employer must suspect or have some indication that an union organizing drive is underway.

The amendments to the *Income Tax Act* are part and parcel of the changes to the method for union certification. Their repeal will mean that information that would be useful in a employer campaign will not be available.

In summary, while it remains to be seen how the promised agenda will be tabled, employers need to keep a close eye on the new government's employment and labour agenda and take opportunities to make submissions on the impact that some of the proposed changes will have on their operations and ability to compete in a global market.

For non-union employers, however, they should use the time that they now have to ensure that their environment will be resistant to a union's organizing efforts. This could include reviewing human resource policies, compensation, benefits and safety programs and making improvements to them if such improvements are warranted.

THE FEDERAL COURT OF APPEAL: IS AN EMPLOYER REQUIRED TO ACCOMMODATE BREASTFEEDING?

By Kathryn L. Meehan

The Federal Court of Appeal's decision Flatt v. Attorney General of Canada is an excellent reminder for employers that when considering accommodation and the duty to accommodate, it is crucial to consider the individual factual circumstances. The decision has attracted some attention for the comment by Justice Trudel stating, "breastfeeding during working hours is not a legal obligation towards the child under her care. It is a personal choice." However, when one considers the factual circumstances of Ms. Flatt's complaint, the ultimate finding that there was no discrimination is not surprising.

Following Ms. Flatt's one year of maternity leave, the applicant requested permission to telework (work from home) on a full time basis between 6:00 a.m. and 2:00 p.m. in order to continue breastfeeding her third child. Breastfeeding is not an enumerated ground under human rights legislation, but as a characteristic tied to sex, it has been held by an adjudicator to be an analogous protected ground: *Carewest v. H.S.A.A. 2001 CarswellAlta 1938*. There have been previous findings that a refusal to provide accommodation for a mother to nurse her child can constitute discrimination. Similarly, *The Policy on Discrimination Because of Pregnancy and Breastfeeding* published by the Ontario Human Rights Commission provides for examples of appropriate accommodation of nursing mothers.

Ms. Flatt's request was denied as it was not "operationally feasible." The applicant then requested an extended leave of absence without pay from March 3, 2013 until June 28, 2013. The employer granted this request. It is important to understand that granting a leave of absence without pay while maintaining the employment relationship is a recognized form of accommodation.

During her extended leave of absence, the applicant proposed an arrangement whereby she would telework two days a week and on the three days while she was in the office, she would take two 45 minutes to attend the daycare center to feed her child. She wanted the breastfeeding time to be paid time and not to forfeit her lunch break. The employer agreed with her proposal but explained that her hours of work were to total 37.5 hours per week, excluding lunch breaks and the time associated with breastfeeding. The applicant did not respond to that. The employer then presented the applicant with three options:

- the applicant telework from home one day a week and in the office four days a working, working a minimum of 7.5 hours a day when in the office
- the applicant work part-time or
- the applicant continue on her leave of absence without pay until she was ready to cease nursing.

The employer, in presenting these options, demonstrated that it was open and flexible to some forms of accommodation. The applicant was not agreeable to any of these options and reverted to her original request to telework from her home on a full time basis. The denial of the five days working from home request was the basis of the grievance that the Public Service Labour Relations and Employment Board ("Board") dismissed.

The Federal Court of Appeal reviewed the Board's application of the four-part test enunciated in *Canada v. Johnstone*, which specified that in order to make out a *prima facie* case of discrimination on the ground of family status, the individual must show the following:

- that a child is under his or her care and supervision;
- that the childcare obligation at issue engages the individual's legal responsibility for that child, as a opposed to a personal choice;
- that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and,
- that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

The Board had concluded that the applicant's evidence fell short on the second and third factors of the test, but also concluded that the employer had accommodated the applicant to the point of undue hardship.

The Court agreed. It affirmed that the issue of *prima facie* discrimination should be decided in light of the factors in *Johnstone*, whether the discrimination was on the basis of sex or family status. The Court noted that the *Johnstone* factors should be applied contextually and it was not persuaded that the applicant had met the second and third factors of the test. It noted that there could be cases where breastfeeding is seen as part of a mother's legal obligation but held that in these circumstances, breastfeeding during working hours was not a legal obligation, it was a personal choice. There was no evidence indicating the particular needs of the child or a particular medical condition, for example, to show that returning to work at the physical workplace was incompatible with breastfeeding.

This decision highlights two important lessons for employers. First, always consider the individual factual circumstances of each request for accommodation. Second, when considering accommodation, if it is not feasible to accept the employee's proposed accommodation, consider offering other multiple options to the employee. Evidence that employers have completed both these steps will help successfully defend against a discrimination complaint.

DAMAGES AND UNJUST DISMISSAL UNDER THE *CANADA LABOUR CODE*

By George G. Vuicic

The Federal Court of Canada recently issued a significant decision concerning the unjust dismissal remedies available to employees under the *Canada Labour Code* ("Code"): *Spruce Hollow Heavy Haul Ltd. v. Madill*. As is often the case, the decision flows from the particular facts involved, and must therefore be understood in that context.

Briefly, the Complainant and her husband ("Madill") were shareholders and employees of Spruce Hollow, together with another married couple, James and Jen Weber. The company operated out of the basement of the Complainant's matrimonial home. In August 2011, the Complainant and her husband separated and acrimonious divorce proceedings ensued. In September 2011, the Complainant's employment with Spruce Hollow was terminated. At that time she was advised that as a result of failure to attend an important business meeting, she was being removed as a director of the company and her signing authorities were revoked.

The Complainant filed an unjust dismissal complaint under the Code. After dismissing various procedural motions brought by the company, the adjudicator found that despite her title of "Administrative Office Manager", the Complainant did not perform any managerial functions at the company and the unjust dismissal provisions of the Code applied. He then concluded that the company did not have just cause to terminate the Complainant's employment. A judicial review application of that decision was brought by Spruce Hollow in Federal Court, which dismissed the application and criticized the actions of the company in the proceedings. The Court directed that the matter be remitted to the adjudicator to determine appropriate remedies.

In his remedies decision, the adjudicator took into account, among other things:

- the repeated assurances the Complainant was given by Mr. Weber, the company President, that the abusive behaviour of the husband would be addressed, which it was not;
- Madill had secured the termination of the Complainant "on charges that were false and even fraudulent," which was then compounded by his bullying and intimidation of her throughout the proceedings "was malicious, harsh and vindictive";
- Madill had filed a police complaint against the Complainant, alleging theft from Spruce Hollow, which was unsubstantiated and "went nowhere";
- Spruce Hollow falsely completed the Complainant's Record of Employment so that she would be denied employment insurance benefits;

The adjudicator awarded the Complainant the following damages:

- $5,450.17 for lost income and expenses;
- $50,000.00 aggravated damages; and

- $25,000.00 punitive damages.

Spruce Hollow applied for a review of this finding. In dismissing the application, the Federal Court provided guidance on awarding aggravated and punitive damages under the Code's unjust dismissal provision.

With respect to aggravated damages, the Court was satisfied that the adjudicator had considered the appropriate criteria. The conduct of Spruce Hollow and Madill was malicious, harsh and vindictive, had demonstrated contempt for the judicial process, was abusive of the Complainant "in the extreme", and she had suffered greatly as a result. The amount of $50,000 was not excessive.

Similarly, the Court found that the award of $25,000 punitive damages satisfied the principle of proportionality and was consistent with test for such an award: 1) the employer's conduct was "reprehensible"; 2) punitive damages were "rationally required, on top of a compensatory award, to punish the defendant and to meet the objectives of retribution, deterrence and denunciation"; and 3) the defendant committed an independent actionable wrong.

Spruce Hollow involved unique facts, underpinned by the overlap of the unjust dismissal claim and the matrimonial proceedings as well as the relationship between the parties and the egregious behavior by the employer.

However, the decision is nonetheless significant for federal employers. First, of some concern for employers generally is the fact the Court found that the Complainant was not required "to provide medical evidence, extensive or otherwise, as a precondition to an award of aggravated damages." Rather, the Court stated that the complainant was only required to provide evidence that the employer's conduct "resulted in injury to her reputation, dignity and integrity, or caused her mental distress."

This approach to the criteria for awarding aggravated damages arguably lowers the threshold that many employers have understood to be required since the Supreme Court of Canada's decision in *Honda Canada Inc. v. Keays*. Employers should be especially sensitive in dealing with employees who are particularly vulnerable or who are experiencing difficult personal circumstances which could affect their work performance.

Second, the case stands as a warning to all employers that adjudicators appointed under the Code will award aggravated and punitive damages in appropriate cases, an approach the Federal Court has now has expressly affirmed. The Court's approval of the adjudicator's application of the damages principles, and affirmation of the significant amounts of aggravated and punitive damages awarded, reinforces the need for employers to carefully consider, document and justify dismissal decisions.

CASE STUDY: PARTICIPATION OF WORK PLACE COMMITTEES AND HEALTH AND SAFETY REPRESENTATIVES IN HEALTH AND SAFETY INVESTIGATIONS

By Elizabeth D. Winter

In Canada Post Corp v. CUPW, the Federal Court upheld an Appeals Officer decision that concluded that Local Joint Health and Safety Committees ("LJHSCs) and Health and Safety Representatives ("HSRs") were required to be physically present for an onsite investigation regarding the safety of rural mail box delivery. In this case, physical presence was necessary to permit the LJHSCs and HSRs to fulfil their obligations under sections 135(7)(e) and 135(6)(g) of the *Canada Labour Code* ("Code").

Sections 135(7)(e) and 135(6)(g) pertain to the duties of work place committees and health and safety representatives (respectively) with respect to participating "in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees…." The LJHSCs and HSRs had been consulted in the development of the safety assessment tool used by the employer but had not been physically present at the investigations. A critical issue, therefore, was the

meaning of “participate” and whether the “participation requirement” under these sections was met.

A previous case before the Federal Court (*Canadian Union of Public Employees, Air Canada Component v. Air Canada*) had considered the foregoing Code provisions and upheld a decision-maker’s conclusion that the physical presence of a work place health and safety committee was not necessary in order to meet the participation requirement. In the current case, the Appeals Officer distinguished the earlier case on the basis that in Air Canada, there had been “extensive involvement in the investigative process, whereas in the within proceedings, the LJHSCs and HSRs were only involved in the elaboration phase, and not in the inspection or investigation phases.” To satisfy the Code requirements here, the Appeals Officer concluded that physical presence of the LJHSCs and HSRs was required in the onsite investigations to allow those parties to fulfill their statutory mandate.

The Federal Court upheld that conclusion as reasonable. It noted that the doctrine of *stare decisis* does not apply in the context of administrative tribunals, that the reasonableness standard of review does not demand consistency in administrative decision making and the Appeals Officer was not bound by *Air Canada*. The Federal Court noted that “there can be different interpretations of the word “participate”, as informed by the facts of a particular case.” In this case, the onsite investigation required an assessment of a number of factors including the number of traffic lanes, the speed and volume of traffic, whether the rural mailbox could be moved to a safer location and other factual issues that required physical presence to observe and assess.

This decision serves as a reminder that each case is fact-driven and that the reasonableness standard of review applied to administrative decisions allows for a range of outcomes rather than a single permissible outcome. In relation to the particular provisions of the Code at issue in the case, the take away is that although it is possible that health and safety committees and representatives may not need to be physically present for onsite investigations, whether actual physical presence is required in any particular case will depend on the facts surrounding the particular investigation.

If you have any questions about the issues raised in this newsletter or any matters affecting your federally regulated workplace, please contact Jodi Gallagher Healy at 519.931.5605 or your regular Hicks Morley lawyer.
