Federal Post

Federal Post – Third Edition

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Dear Friends,

Along with the arrival of spring, we are pleased to bring you the first *Federal Post* edition of 2016, our newsletter designed exclusively for federally regulated employers.

In this issue, George Vuicic and of our Ottawa office provide an overview of entitlements under the *Canada Labour Code* (*CLC*) for a pregnant or nursing mother who believes that any of her current job functions may pose a risk to her health or that of her foetus or child. Cases canvassing the type of medical evidence required to establish entitlement are discussed.

Recent focus on the unjust provisions of the *CLC* has been on whether dismissals without cause are permitted, as discussed in our *Federal Post* – First Edition. In this issue, Frank Cesario of our Toronto office examines unjust dismissal from a different angle: damages awarded under those provisions. The article discusses the application of the common law reasonable notice period, the potential for a monetary award to be granted in excess of that claimed and how adjudicators have taken employee misconduct into account in making their awards.

Our Ottawa office has produced a second article for this issue, thanks to Gabrielle Fortier-Cofsky. Gabrielle write on current pension issues in the federally regulated sector and what employers should expect in 2016, including administration and investment changes coming into effect July 1, 2016. The authors also comment that the federal Department of Finance has expressed a willingness to receive feedback from employers wishing to comment on the inclusion of federally regulated employees in the Ontario Registered Pension Plan: note that any employer comments should be provided as soon as possible.

Finally, Simon Mortimer of our Toronto office brings you an update on the Federal Contractors' Program. The Program expands the reach of the federal employment equity legislation to certain provincially regulated entities that contract with the federal government, requiring them to achieve and maintain a workforce that is representative of the Canadian workforce.

We hope you enjoy this issue of the *Federal Post*. As always, we welcome your comments and suggestions for topics to be covered in future editions.

Sincerely

Jodi Gallagher Healy

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Pregnant or Nursing Federally-Regulated Employees Entitled to Full Pay and Benefits

By George G. Vuicic and Gabrielle Fortier-Cofsky

On February 26, 2016, a private Member of Parliament introduced Bill C-243, a *National Maternity Assistance Program Strategy Act.* The Bill proposes to amend the *Employment Insurance Act* to allow a claimant to use her maternity benefits 15 weeks before her due date if her job poses a risk to her health or the health of her unborn child.

If passed, Bill C-243 might fill a gap for provincially regulated employees; however the *Canada Labour Code* (*CLC*) already addresses this type of situation for federally regulated employees. Section 132 of the *CLC* allows a pregnant or nursing employee to cease to perform her job if she believes that, by reason of the **pregnancy or nursing**, continuing any of her current job functions may pose a risk to her health or the health of the foetus or child. The employee must consult with a medical practitioner as soon as possible to determine if continuing any of her current job functions poses a risk to her health, the health of the foetus or the child. The employer may, in consultation with the employee, reassign her to another job that would not pose such a risk. More importantly, the employee, **whether or not she has been reassigned to another job**, is deemed to continue to hold the job that she held at the time she ceased to perform her regular job functions and **is entitled to continue to receive the wages and benefits** that are attached to that job for the period during which she does not perform the job.

These provisions can become onerous for employers, as employees can request this accommodation as soon as they learn that they are pregnant. Moreover, section 132 applies not only to pregnant employees, but also to nursing employees. While the end of a pregnancy is a clear end to the employer's pregnancy-related obligations, the end of the nursing-related obligations is not as clear. As the duration of nursing is a personal choice, employers may have to provide reassignment for a lengthy period of time. Therefore, inequitable results could arise between an employee who nurses and another who doesn't, or as between employees who do not

nurse for the same period of time.

In order to better evaluate their obligations, employers should consider establishing a framework for complying with these provisions, especially since the case law decided to date does not provide significant guidance regarding their interpretation.

For example, in Marois v. Canada (Treasury Board), the collective agreement gave the employer the right to an "independent medical opinion" when reassignment was requested on the basis of section 132 of the *CLC*. In this case, Correctional Services offered two correctional officers reassignments that they both turned down, as their medical certificates required "no contact with inmates". The reassignment involved minimal and irregular, but some, inmate contact. Correctional Services asked Health Canada its opinion with regard to the reassignment. The Public Service Staff Relations Board (Board) concluded that the opinion from Health Canada could not be considered an independent opinion, as it was from another federal government department. In the absence of an independent medical opinion, there was no reason for the employer not to apply the collective agreement. Consequently, the two grievors were entitled to be considered on leave with pay up to the start of their respective maternity leave or termination date of the pregnancy, whichever came first.

Also, as with accommodation, both employers and employees have the obligation to ensure the success of the reassignment. Turmel v. Treasury Board (Correctional Service of Canada) was another case about a correctional officer requesting reassignment. The employee asked to be reassigned and to have no contact with inmates. However, she encountered inmates on six occasions. The Board observed that the employer could have verified whether the restriction on contact with inmates was justified, but the employer did not take advantage of that right. As a result, the employer had to comply with the collective agreement. The Board confirmed that both the employer and employee had obligations to ensure the success of the accommodation. It then evaluated every encounter to determine whether the employer, the employee, or both, were at fault and if there had been a breach of the collective agreement.

It is apparent that medical evidence is key whenever an employee asks to be reassigned. In VIA Rail Canada Inc. v. Patel, the Occupational Health and Safety Tribunal of Canada concluded that on the basis of the medical evidence provided by the parties, the evidence did not show that the employee's work schedule posed risks to the health of her unborn child.

As in any accommodation situation, employers will want to carefully scrutinize medical evidence presented by the employee to determine whether it genuinely supports the employee's request.

An Update on Damages for Unjust Dismissal: What Employers Need to Know

By Frank J. Cesario

The *Canada Labour Code* (*CLC*) provides a procedure for federally regulated, non-union employees to bring their dismissal before an adjudicator to determine whether it was 'unjust' pursuant to section 240 of the *CLC*.

If an adjudicator finds that the dismissal was unjust, he or she has broad remedial powers, including the ability to reinstate the employee to his or her position and/or to order monetary compensation. The *CLC* has been interpreted as granting adjudicators the authority to make any order deemed necessary in order to remedy damages arising as a result of an unjust dismissal.

Discussed below are recent key remedial decisions by adjudicators that employers should be aware of in assessing the potential risks associated with a filed unjust dismissal complaint.

Application of Common Law Periods of Reasonable Notice

A recent decision suggests that, despite the broad remedial powers of adjudicators, it is appropriate to look to the common law period of reasonable notice in determining the appropriate remedy where unjust dismissal has been established.

In *Daoust and JP Morgan Chase Bank Natlonal [sic] Assn.*[1], an employee was absent from work after a period of suffering from health issues and severe mental stress. The employee applied for LTD, which was declined. The employer ended the employee's employment in accordance with the employer's attendance policy, which stated that an employee could be terminated if he or she was absent from work without leave for more than three days. The adjudicator found that the dismissal was unjust.

The employee had commenced work at a new position and was not seeking reinstatement, but sought wages and benefits for the entire period between his termination and finding a new position (approximately six months). The adjudicator declined to order six months and instead granted three months' notice – roughly in line with the common law notice period for a three year employee.

In establishing the appropriate notice period, the adjudicator relied on the Federal Court of Appeal's decision in Wilson v. Atomic Energy of Canada*.* He noted that this decision establishes that it is appropriate for adjudicators to refer to the common law for guidance in determining an appropriate notice period for a claim of unjust dismissal under the *CLC.*

Monetary Compensation Beyond That Claimed

In another recent decision, an unjust dismissal adjudicator found it appropriate to award a remedy that was significantly in excess of the compensation requested by the employee.

In *Wiebe and Lambert Trucking (1994) Ltd., Re*[2], the employee was a truck driver whose employment was terminated because of a series of complaints from customers regarding his

attitude and his growing number of violations with the Department of Transportation. The employee claimed unjust dismissal and requested a monetary remedy equal to four weeks of salary.

The adjudicator found that the dismissal was unjust. Instead of ordering four weeks of salary, however, he found that it would be appropriate to order 4.5 *months* of compensation. In his reasons, the adjudicator held that "I am not limited to that claim [i.e. the complainant's claimed damages] where there is unjust dismissal."

The adjudicator also noted that there was "no limit" to the remedial authority of an adjudicator where an unjust dismissal has occurred (except that the adjudicator cannot put the employee in a better position than he or she would have been in without the dismissal).

As a result, employers should be cognizant that an unjust dismissal claim could create the potential for greater liability than the amount claimed by the employee.

Contributory Fault on the Part of the Employee

An argument employers have under the *CLC* that does not exist at common law is that there was contributory fault on the part of the employee that should reduce any monetary damages awarded.

This argument is available because unjust dismissal adjudicators can find that the employee's wrongdoing should lead to a reduction in the quantum of damages that are awarded. Similar considerations can be taken into account as a factor militating against the reinstatement of a terminated employee to his or her former position.

An example of the application of the contributory fault approach can be seen in *Furber v. Polymer Distribution Inc.*[3] The employee in that case refused an assignment and claimed that his medical condition justified not following instructions (without evidence to support the existence of such a condition).

The adjudicator found that the dismissal was just and he did not award compensation. He noted, however, that if he was wrong and compensation should be awarded, it should be adjusted to take into account the employee's conduct that contributed to the dismissal and to the situation as a whole.

In a 2014 decision, *Payne v. Bank of Montreal*[4], an adjudicator also accepted that misconduct on the part of the employee is a factor that should be considered when determining an appropriate monetary remedy. The employee was a bank manager who was terminated due to issues arising out of a relationship with a subordinate employee.

The adjudicator considered the employee's misconduct as a factor in determining the appropriate remedy. The adjudicator wrote that the employee's misconduct "will be reflected by a reduction in

the monetary compensation that he will be awarded, as he must bear part of the blame for the situation in which he now finds himself."

These decisions highlight that employers should be mindful of the full range of submissions that they can make in moderating and shaping a potential remedial award in an unjust dismissal case under the *CLC.*

(With thanks to Hicks Morley Articling Student Kristen Kersey for her assistance with this article)

Pension Issues for Federally Regulated Employers: What to Expect in 2016

By Lisa J. Mills and Gabrielle Fortier-Cofsky

This article summarizes select initiatives related to public pension programs and pension plans regulated under the *Pension Benefits Standards Act, 1985* for employers operating in federally regulated industries.

Public Pension Plan Update – Ontario Retirement Pension Plan and Canada Pension Plan

In 2014, following years of discussion regarding possible enhancements to the *Canada Pension Plan* (CPP) and the adequacy of retirement savings for middle income earners, the Ontario government announced its plan to create a mandatory province-wide pension plan. The *Ontario Retirement Pension Plan Administration Corporation Act, 2015* and the *Ontario Retirement Pension Plan Act (Strengthening Retirement Security for Ontarians), 2016* (Bill 186) introduced on April 14, 2016, will together establish the benefit design, administration and investment management framework for the Ontario Retirement Pension Plan (ORPP). The ORPP will apply generally to Ontario employees who do not participate in a comparable workplace pension plan.

The question of whether federally regulated employers with employees living and working in Ontario are required to participate in the ORPP had not been definitively addressed by the Ontario government until mid-April 2016. In a backgrounder released on the same day Bill 186 was introduced, the Ontario government indicated that the participation of federally regulated employers would require amendments to federal legislation and that the ORPP does not extend to these workplaces at this time. The Ontario government indicated that it is currently in discussions with the federal government to support the participation of federally regulated employees in the ORPP and the federal Department of Finance expressed a willingness to receive feedback from employers wishing to comment on the inclusion of federally regulated employees in the ORPP. Employers are encouraged to provide their comments as soon as possible. There are estimated to be over 200,000 Ontario-based federally regulated employees who do not participate in a pension plan.

As noted above, CPP enhancement is an alternative to the implementation of the "made in Ontario" ORPP. On February 16, 2016, an agreement was reached by the governments of Canada and Ontario to engage in dialogue with the aim of enhancing the CPP. Following this agreement, the Ontario government delayed the earliest ORPP implementation date by one year from January 1, 2017 to January 1, 2018. The Ontario and federal governments will work with other provinces and territories to develop options for CPP enhancements for discussion at the Federal-Provincial-Territorial Finance Ministers meeting in June 2016. CPP enhancements, if they can be agreed upon, would very likely impact all Canadian employers including those operating in the federally regulated sector.

Pension Plans Governed by the *Pension Benefits Standards Act, 1985* (PBSA)

For federally regulated employers who administer pension plans subject to the PBSA, we highlight below some updates provided by representatives of the Office of the Superintendent of Financial Institutions (OSFI) and the federal Department of Finance at the 2016 OSFI Pension Industry Forum held on March 31, 2016. We also wish to remind administrators about regulatory changes that will come into effect on July 1, 2016.

OSFI Update on Defined Contribution (DC) Study

In May 2015, OSFI invited 42 DC pension plan administrators to participate in a DC study in order to determine whether OSFI's current filing requirements and risk indicators are sufficient for monitoring the risks associated with DC pension plans. OSFI has concluded that it should capture more information to identify DC plans that may expose members to low retirement benefits and to test whether good governance practices around member communications are in place. Concerns may include situations in which contributions have not been maximized, fees and expenses are not reasonable, or members' account growth has not been adequately monitored. OSFI is now reviewing the reporting requirements relating to member communications, default investments and growth of individual member's accounts. OSFI reported that it is considering requiring select administrators to complete annual questionnaires, conducting more DC plan examinations or requesting additional information across the board from DC plan administrators.

OSFI Update on Plan Examination Findings

OSFI staff provided an update on frequent findings in the pension plan examinations it conducts. Some of the frequent findings include inadequate governance policies, lack of rigour in documenting governance self-assessments, failure to document funding policies and annual SIP&P reviews, and missing content on member annual statements. We note that the Canadian Association of Pension Supervisory Authorities recently released a consultation draft updating the *CAPSA Guideline No. 4: Pension Plan Governance* and the related *Self-Assessment Questionnaire* and *FAQ Document.* This is a good source of updated information to assess current pension governance practices and allow administrators to make any refinements that may be

appropriate.

On the Horizon – Department of Finance Update

De-risking initiatives including annuity purchases and longevity insurance are being used more frequently to manage risk in defined benefit plans. One of the concerns plan sponsors continue to have is the "boomerang" risk associated with the purchase of buy-out annuities. The Department of Finance has signalled that a resolution to the issue will be brought forward in the near term.

Target Benefit Plans (TBPs) were the subject of an extensive consultation beginning in June 2014. The Department of Finance indicated that moving forward with a federal TBP initiative remains a priority.

Consistent with the federal Budget released in March 2016, the Department of Finance confirmed at the 2016 OSFI Pension Update that:

- the consultation on the limitation on pension fund investing that currently precludes pension fund administrators from holding more than 30% of the voting shares of any corporation (subject to limited exceptions) will begin shortly; and
- legislative changes to the PBSA to enhance the federal government's ability to coordinate the regulation of multi-jurisdictional pension plans with one or more of its provincial counterparts will be proposed.

The anticipated legislative changes were introduced on April 20, 2016 as part of Bill C-15, the federal government's budget implementation bill.

Administration and Investment Changes Coming Into Effect on July 1, 2016

As reported in the *Federal Post* – First Edition, a number of changes to pension plan administration and investment practices will come into effect on July 1, 2016 including:

- new disclosure requirements for annual statements for active members, including information on the plan's funded status, investments and employer contributions for defined benefit plans and detailed investment information for member-directed defined contribution plans;
- a new requirement to issue annual statements to deferred vested and retired members;
- a new requirement for a member's spouse or common-law partner to consent using Form 3.1 for member-directed transfers to life income funds and locked-in registered retirement savings plans if the member is eligible to commence an immediate pension at the time of the transfer; and
- changes to certain pension fund investment rules. Read more information on pension fund investment regulations amendments.

This update on the policy and regulatory initiatives relating to private pension plans shows a particular concern for pension plan governance matters. In 2016, federal employers should expect OSFI's plan examinations and other risk management processes to become focused on governance issues for all pension plans, member disclosure matters, as well as issues specific to DC plans. We should also see legislation addressing multi-jurisdictional plan issues and annuity buyouts. Federally regulated employers should also be alert to new developments relating to CPP enhancements and ORPP coverage for Ontario-based federal employees as these initiatives may affect payroll costs or the design of current retirement plans provided to employees.

The Federal Contractor Program

By Simon E. Mortimer

While Québec has Chapter A-2.01: *An Act Respecting Equal Access To Employment In Public Bodies*, across all of the common law legal jurisdictions in Canada, only the federal government has and maintains an *Employment Equity Act* (Act). The Act applies to federally regulated industries, Crown corporations and other federal organizations with 100 employees or more and requires those organizations to collect and maintain data and to undertake special measures for four designated groups:

- women
- Aboriginal peoples
- persons with disabilities
- members of visible minorities

Since 1986, the federal government has maintained a program, known as the Federal Contractors Program (FCP), which expands the reach of its employment equity legislation to certain provincially regulated companies. Any company which does business with, or is interested in doing business with, the federal government must be aware of the program and its requirements. Federally regulated employers, already bound by the Act, may not have a direct concern but should be aware of these requirements so as to ensure compliance by business partners and subcontractors on federal government contracts.

The FCP was designed to ensure that contractors who do a certain level of business with the government of Canada achieve and maintain a workforce that is representative of the Canadian workforce. Changes to the FCP in June 2013 both raised the threshold of those who are captured by the scope of the program and also redefined the assessment of achievement and maintenance.

The FCP applies to federal contractors which: (1) have a workforce in Canada of over 100 permanent full-time, permanent part-time and/or temporary employees; and (2) enter into a federal government goods and services contract, a standing offer, or a supply arrangement valued at $1 million or more (including applicable taxes). In determining the workforce it must be noted that it is

not the workforce which will be performing the contract which must exceed 100, but rather the total employment numbers of the contractor.

Contractors who bid on a qualifying contract must now, as part of the bid, certify their commitment by signing a standard form “Agreement to Implement Employment Equity”. Contractors confirm that they will implement the FCP, a process which requires a commitment to certain requirements if they are successful on the bid:

1. **Collect workforce information**

The contractor must survey, through self-identification questionnaires given to permanent full-time and permanent part-time employees, the representation of each of the designated groups above in each occupational group. Information from the questionnaire must stay confidential and kept separate from personnel files. As many employers address issues of diversity and inclusion in their workplace and are also confronted with concerns around personal privacy, the distribution of such a questionnaire should be done with careful consideration. This is particularly so as contractors are expected to make reasonable efforts to get at least 80% of all employees to return the questionnaire.

Once questionnaires are conducted, the records must be kept up to date. For example contractors must provide a questionnaire to new employees and employees must be permitted to change information on the self-identification questionnaire should they wish to do so. For each employee there must be an employment equity record showing: hire date; designated group membership, if any; salary and salary increases, if any; promotion date(s), if any; employment status; location of work; termination date; and a copy of self-identification questionnaire(s) and related information. This information must be retained for at least three years.

2. **Complete a workforce analysis**

Once a survey is conducted, the contractor must complete a workforce comparison with external data to determine if there are gaps in the representation of any designated groups.

3. **Establish short-term and long-term numerical goals**

Relying on workforce analysis reports, the contractor is expected to identify specific and numerical goals to increase the representation and participation among the identified groups.

4. **Make reasonable progress and reasonable efforts**

Measures to ensure reasonable efforts are being made to achieve goals include adopting accountability mechanisms for employment equity, ensuring support for employment equity among senior management, putting strategies in place which support a barrier-free workplace and

adopting monitoring procedures. Where gaps in representation are identified, the contractor should review its employment equity initiatives or policies as they relate, for example, to recruitment, training, promotion and human rights to see if they are creating barriers.

Other best practices include communicating regularly with employees about the contractors' commitment to, and progress of, employment equity initiatives in the workplace and consulting/collaborating with bargaining agents or other employee representatives.

The task of complying is not insignificant and it is important to be mindful of the obligation being assumed when entering into applicable federal contracts. Compliance assessments are conducted by the FCP and those assessments will turn on the reasonableness of efforts and progress made having regard to industry and the employer's size and scope.

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[1] 2016 CarswellNat 568

[2] 2015 CarswellNat 4511

[3] 2011 CarswellNat 2234

[4] 2014 CarswellNat 349

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