Federal Post

Federal Post – Fourth Edition

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Dear Friends,

We are pleased to bring you the final 2016 edition of the *Federal Post*, our newsletter designed exclusively for federally regulated employers.

In this issue, Amy R. Tibble of our Toronto office provides the background to the *Wilson v. AECL* case which culminated in the landmark Supreme Court of Canada decision rendered last summer. That decision involves the application of the unjust dismissal provisions under the *Canada Labour Code* (Code) where termination of employment is without cause. Amy also provides some useful tips for employers on managing terminations in light of that decision.

We would be remiss not to include an article on the upcoming enhancements to the Canada Pension Plan (CPP). Stephanie J. Kalinowski of our Toronto office reports on the key components of the CPP enhancement, when the enhancements will be phased-in and how those enhancements will affect employers. The federal government has now tabled legislation to move this initiative forward.

In our 2015 year-end edition of the *Federal Post*, Ian S. Campbell of our Waterloo office provided an overview of possible legislative changes of interest to federally regulated employers that might be enacted by the [then] newly elected Liberal government. One year later, David W. Foster of our London office revisits the issue. He reports that, as promised, the federal government has moved forward with repealing legislation passed by the previous government which, among other things, provided for mandatory union certification votes under the Code and compelled public disclosure of union information. David also notes the introduction of legislation seeking to add gender expression and gender identity as prohibited grounds of discrimination under the *Canadian Human Rights Act*.

Finally, Glenn P. Christie of our Waterloo office provides a case commentary on a very interesting decision out of the Federal Court of Appeal in which the Court found that a party not directly affected by an allegedly discriminatory act has the standing to bring a complaint to the appropriate body about the alleged discrimination.

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

Sincerely,

George G. Vuicic

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An Update on *Wilson* and Unjust Dismissals

By: Amy R. Tibble

Over the past several years, two divergent views evolved on the issue of whether a federally regulated employer could terminate, without cause, the employment of a non-managerial employee without giving rise to an unjust dismissal complaint under section 240 of the *Canada Labour Code* (Code). A recent decision by a majority of the Supreme Court of Canada has provided some guidance on this issue – but the matter is far from resolved.

This article will provide a brief history of the Wilson v. Atomic Energy of Canada Ltd. decision and discuss its implications.

Background

Joseph Wilson was terminated without cause from Atomic Energy of Canada Limited (AECL) after approximately four and a half years of service. AECL offered Mr. Wilson six months' severance pay, in exchange for a release. Unsatisfied with the offer, Mr. Wilson brought a complaint under section 240 of the Code and argued that a federal employer is prohibited from dismissing an employee without just cause. The adjudicator agreed with Mr. Wilson and directed the parties to negotiate a remedy.

Federal Court

AECL applied for judicial review of the decision. The matter was remitted back to the adjudicator for redetermination after the Federal Court found that the adjudicator's interpretation of the Code was unreasonable. Mr. Wilson appealed that decision to the Federal Court of Appeal.

Federal Court of Appeal

The Federal Court of Appeal upheld the lower court decision. It found that dismissal without just cause is not automatically unjust under Part III of the Code; rather, federal employers retain the right to dismiss without just cause by providing an appropriate severance package to the terminated employee. Doing so, however, does not insulate the employer from scrutiny under the unjust dismissal provisions of the Code. An adjudicator will maintain the right to assess the circumstances of the situation and determine if it was unjust (e.g. where the termination was a result of improper motives).

The Federal Court of Appeal further stated that there was no statutory authority in the Code which ousted the relevant aspects of the common law. In the Court's view, the Code was enacted to build on existing common law in the absence of a provision that explicitly overruled the common law. Mr. Wilson further appealed.

The Supreme Court of Canada

A majority of the Supreme Court of Canada overturned the Federal Court of Appeal finding and restored the adjudicator's decision. It first reviewed the history and statutory framework of the Code, followed by a discussion of how adjudicators have interpreted relevant Code provisions in the past.

Abella J., writing for the majority, referred to Parliament's intent in 1978 with the establishment of the unjust dismissal provisions (ss. 240-246). First, she stated the inclusion of the "unjust dismissal" provisions was to expand dismissal rights to non-unionized federal employees. Additionally, the termination and severance provisions of the Code (ss. 230(1) and 235(1)) were not alternatives to the unjust dismissal provisions. Rather, they apply to those employees who do not have recourse to the unjust dismissal provisions, such as managerial employees and employees with less than 12 consecutive months of employment.

The majority of the Court noted the historical divide between adjudicators on the application of these provisions. Out of 1740 decisions regarding unjust dismissals rendered since 1978, 28 found that the provisions permitted terminations without cause. Therefore the majority concluded that adjudicators and courts had overwhelmingly viewed the unjust dismissal provisions under the Code as "a statutory alternative to the common law of dismissals" and that such provisions gave "unorganized workers protection against unjust dismissal somewhat comparable to that enjoyed by unionized workers under collective agreements" [at para 49].

The Dissent in *Wilson*

It is important to note there was a strong dissent by Justices Côté, Brown and Moldaver, who held that a without cause dismissal is not *per se* unjust, as long as adequate reasons are given.

Where We're at Now

Wilson has clarified that employees to whom the unjust dismissal provisions apply are protected from being unjustly dismissed and are entitled to just cause protection “analogous” to that afforded to federally regulated unionized employees. That is, employers do not have the ability to terminate non-managerial employees with more than 12 consecutive months of service without “just cause” within the meaning of the Code. Effectively, the common law right to terminate without cause has been ousted for these classes of employees and employers cannot deprive employees of “the full remedial package Parliament created for them.”

In light of the *Wilson* decision, it continues to be important for employers to manage and document ongoing performance issues and to ensure a management and progressive discipline process is followed in order to establish a dismissal is not unjust. Employers should continue to review the performance of short service employees and assess to the extent possible whether employment should continue beyond 12 months. If severance packages and/or settlements are achieved with a terminated employee, employers would be wise to be judicious in the use of releases. Above all else, provide reasons for the termination to establish the termination is not unjust.

With thanks to our Articling Student, Ryan Plener, for his assistance in preparing this article.

Farewell ORPP, Hello Expanded CPP

By: Stephanie J. Kalinowski

Will Canadians have enough saved to live on in retirement?

Concerns that for a sizable proportion of the population, the answer will be “no”, and a lack of willingness by the then federal government to discuss expanding the Canada Pension Plan (CPP), prompted the Ontario government to forge ahead in 2014 to establish the Ontario Retirement Pension Plan (ORPP). With the election of a new federal government in the fall of 2015, the dynamics changed and, on June 20, 2016, the federal government announced that an agreement in principle had been reached with nine of the provincial Ministers of Finance to enhance the CPP.

The agreement has since been ratified by all nine of those provinces, creating enough support to allow the enhancement to proceed.

Now that it’s here, what does an expanded CPP mean for the workplace?

How is CPP’s design changing?

There are three key components of the enhancement:

- the CPP benefit formula will be improved by increasing the target income replacement from 25% to one-third of pensionable earnings;

- the maximum amount of earnings subject to CPP will increase by 14%; and
- employers and employees will both contribute more to fund the higher benefit formula and higher earnings limit.

The improved benefit will apply to future service only, meaning that existing workers will only partially benefit from the enhancement.

The enhancements will be phased-in starting on January 1, 2019. First, the higher benefit rate and increased contribution rate on earnings up to the Year's Maximum Pensionable Earnings (YMPE) will be phased-in over five-years. Then, the increase to the maximum earnings limit and the contributions on those additional earnings will be phased-in over two years. Based on the government's estimates, by 2023 employers and employees will each contribute an additional 1% on pensionable earnings up to the YMPE, for a total of 5.95% each[1]. Starting in 2024, employers and employees will also each contribute 4% on earnings above the YMPE up to the new Upper Earnings Limit (UEL), which is projected to be $82,700 in 2025. The contribution increases and earnings limits are currently estimates and must be confirmed by the Chief Actuary.

As part of the announced package, there are two tax measures being taken in relation to the additional contributions:

- an enhancement the federal Working Income Tax Benefit to offset the impact of increased contributions on low-income workers; and
- making employee contributions associated with the enhanced portion of CPP tax deductible instead of eligible for a tax credit.

Unlike the ORPP, there is no comparable workplace pension plan exemption available to avoid the application of the enhancements. And what of the ORPP? The Ontario government announced its plans to repeal the Ontario Retirement Pension Plan Administration Corporation Act, 2015 this Fall.

What about employees in Quebec?

Quebec, which operates the Quebec Pension Plan (QPP) for Quebec workers, is examining its options and is signalling that it may take a different, more targeted approach to modifications to the QPP. If it proceeds, the QPP and CPP may no longer offer identical benefits.

How will the enhancements affect employers?

Aside from higher contributions starting in January 2019, the overall impact is less definable and may vary from employer to employer.

Many defined benefit plans have contribution and/or benefit formulas that are integrated with the year's maximum pension earnings (YMPE). As currently proposed, it is not clear that the cost of,

or benefits payable under, these plans would immediately be affected by the enhancement. In DC pension plans or for group RRSPs that have voluntary employee contributions, some members may contribute less since they will be contributing more to CPP. This could, in a matched DC plan, offset or partially offset the higher contributions employers will be making to the CPP. Each employer will need to individually assess the expected overall cost impact to it in their circumstances.

Cost implications aside, the alternations to the CPP's design present an opportunity for employers to step back and consider their own retirement plan designs. What kind of retirement income is it expected to produce for employees? Does it pay too much when combined with CPP? How does it affect member behaviour? Will employees retire too soon, or too late? The phasing-in of the enhanced CPP benefit may complicate the answers to some of these questions, but for some employers the enhancement may prompt an assessment of their plan design that is overdue. For employers with employees in Quebec, this assessment may be complicated to the extent that the QPP's design diverges from that of the CPP.

Before conducting this analysis, employers may find it helpful to educate key internal decision-makers about the changes. It might also be desirable to be proactive and educate the broader employee population about the changes and what they are and when they begin.

After considering the cost and design issues, some employers may determine that it is desirable to amend their workplace plans. Before making changes to employee compensation packages, employers will want to consider any filing and notice requirements under pension law, constructive dismissal implications for non-union employees and the collective bargaining implications in a unionized workplace. Other employers may determine that changes are not necessary and the additional payroll costs will simply be absorbed.

Are the changes final?

Legislative amendments are needed before the proposed changes can take effect. On October 6, 2016, the federal government introduced legislation containing the amendments to the *Income Tax Act*, the Canada Pension Plan and other legislation that are needed to implement the enhancement. It is expected that the Bill will pass.

Because of the complexity, planning now rather than later may put employers in a better position to be ready for the changes, including responding to employee reaction to them.

Liberal Government Proceeds with Changes to Federal Labour Laws

By: David W. Foster

As reported in our December 2015 *Federal Post* edition, the federal Liberal government swept into

power in October 2015 with promises of significant changes to federal labour and employment standards. One year later, we have reviewed the progress to-date on these measures, as well as any additional legislative measures of interest to federally regulated employers.

Repeal of Bills C-525 and C-377

One of the first actions taken by the government after assuming power was to follow through with its platform commitment to repeal controversial private members' bills passed under the previous Conservative government. Both bills were vigorously opposed by organized labour and passed without the support of other political parties.

Bill C-525 provided for mandatory union certification votes under the *Canada Labour Code*, and lowered the threshold required to trigger a decertification vote to 40 percent. Similar changes were made to the *Parliamentary Employment and Staff Relations Act* and the *Public Service Labour Relations Act*. These changes came into force on June 16, 2015.

Bill C-377 compelled the public disclosure of union financial information under the *Income Tax Act*. Although the reporting requirements were to come into effect on December 31, 2015, the Liberal government has waived the financial tracking requirements that the Bill would have imposed on unions.

On January 28, 2016, the government introduced Bill C-4, which sets out to repeal the changes to the *Canada Labour Code*, the *Parliamentary Employment and Staff Relations Act*, the *Public Service Labour Relations Act* and the *Income Tax Act* set out in Bills C-525 and C-377. Bill C-4 would simply undue the changes made by Bills C-525 and C-377, returning to the status quo that existed before the enactment of the Conservative private members' Bills.

Bill C-4 has been reviewed by the House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities. It has been returned, without amendment, for third reading.

Gender Expression and Gender Identity under the *Canadian Human Rights Act*

Bill C-16, a government bill introduced on May 17, 2016, seeks to add gender identity and gender expression to the prohibited grounds of discrimination set out in the *Canadian Human Rights Act*. This follows a similar amendment made to the Ontario *Human Rights Code* in 2012.

As this Bill has yet to be debated, various party positions are yet to be known. However, passage is to be anticipated given the Liberal majority in the House of Commons. Significant implications are not expected should these amendments be adopted, as has been the case in Ontario.

Flexible Work Arrangements

Although legislation has yet to be tabled, the Minister of Labour recently concluded a series of national consultations on the flexible work arrangements in the federal sector. Minister Mihychuk's mandate letter from the Prime Minister included a commitment to amend the *Canada Labour Code* to provide every federally regulated worker the right to formally request a flexible work arrangement.

Topics discussed during the consultations included that a formal right to request be cemented in law, as well as the right to have reasons for the denial of a request if such is the case. Some stakeholders argued that employees should have recourse to a labour inspector should they disagree with the employer's decision on their request. Protection against reprisal for employees requesting flexible work arrangements was also raised a potential legislative measure.

With consultations now concluded, the next step will be the introduction of a government bill. However, given other legislative priorities, the timing of these amendments in unknown.

Conclusion

In summary, although the Liberal government has not yet taken action on all of its platform commitments of interest to federally regulated employers, prompt action has been taken on the reversal of the more controversial changes enacted during the prior Conservative government's tenure.

Employers should, however, keep their attention firmly placed on the potential changes to flexible work arrangements and other employment standards-related commitments made by the Liberal Party in the 2015 election, as these items can be expected to have a more noticeable impact on day-to-day operations.

We will continue to monitor the progress of any relevant legislative or regulatory measures undertaken by the Liberal government and will advise of any notable developments

A Case Study: Court Grants Standing to a Party Not Directly Affected to Challenge Alleged Discriminatory Act

By: Glenn P. Christie

Does someone who was not directly affected by an airline's seating policy for obese passengers have the standing to make a complaint about the alleged discriminatory policy before the Canadian Transportation Agency? The Federal Court of Appeal recently held that they do.

In Lukács v. Canada (Transportation Agency) the Court stated that a person did not have to be personally affected by a situation on an airline in order to have standing to bring a complaint about

an alleged discriminatory practice.

In law, the concept of standing refers to the ability of someone to demonstrate a sufficient connection to, and harm from, an action to support their participation in a case. Tribunals and courts apply the concept of standing as a part of their gatekeeper function to control access and manage the types of complaints that they deal with.

The facts of the case were straightforward. An airline passenger (not Dr. Lukács) wrote an email to the airline to complain about the fact that he had to sit next to a large passenger (again, not Dr. Lukács) and he felt “cramped” as a result. The airline responded by email, outlining the airline’s policy for dealing with large passengers. Dr. Lukács, who, according to press reports, has filed more than two dozen complaints with the Canada Transportation Agency about various airline issues, obtained a copy of the email and made a complaint to the Agency.

The Agency dismissed the complaint due to a lack of standing on the part of Dr. Lukács. The fact that Dr. Lukács, at six feet tall and 175 pounds, would never be subject to the airline’s policy regarding large passengers meant that he did not have a “sufficient interest” to bring the complaint.

The Federal Court of Appeal unanimously disagreed and overturned the Agency’s decision based upon a number of considerations. First, there is a general concern that in situations where discrimination is alleged to be occurring, the regulatory body concerned with remedying discrimination should not have to wait for an actual complainant who is directly affected to come forward to be able to deal with the situation.

Second, the legislative purpose behind the Agency was two-fold. First, it was to deal with individuals who had a need for economic or other redress as a result of situations that arose in the transportation system and to ensure that the legislative policies of the government were being carried out by the transportation providers. The second purpose clearly favoured a wider right of standing than the first purpose.

Applying these considerations to Dr. Lukács’ complaint, the Court stated that if the objective was to ensure that air carriers provided services that were free from discrimination, one should not have to wait to be subjected to an alleged discriminatory practice in order to have the standing to make a complaint.

The case demonstrates that the courts will take an open-minded approach to granting standing to persons who have no personal interest to make complaints to specialized Tribunals that have wide responsibilities over particular industries.

[1] Currently, employers and employees contribute to the CPP at a rate of 4.95% of each covered employee's income between $3,500 and the YMPE, which is $54,900 for 2016.

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