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Featured Articles

The Road Ahead: Human Resources Trends and Issues to Watch in 2017

By: Thomas W. Agnew

In the human resources world, a new year means new challenges. Here are three human resources issues your organization should be thinking about as it prepares for the road ahead.

Minimum Standards "Only" Termination Provisions – Is the Pendulum Swinging?

Employers often enter into employment contracts that limit entitlement upon termination only to what is otherwise available under the minimum standards legislation. Traditionally, these clauses have provided certainty at the outset of the employment relationship as to employer liability should the relationship end.

In recent years, some Ontario courts have taken a strict approach to interpreting termination clauses which are limited to "minimum standards only," finding that the clauses are unenforceable due to ambiguity. This approach has been applied even where the clauses may be ambiguous *at some point into the future,* not necessarily in the specific case. Employers, therefore, have been left unexpectedly liable for common law notice payments.

However, some recent cases suggest that the courts may be taking a more contextual approach to interpreting these "minimum standards only" termination clauses.

In *Oudin v. Centre Francophone de Toronto*, the Ontario Court of Appeal affirmed a lower court

decision that looked to the intention of the parties in upholding a “minimum standards only” clause. It cited with approval the finding of the lower court that it is *not* the law “if any potential interpretation can be posited that might in some hypothetical circumstance entail a potential violation of the [*Employment Standards Act, 2000*], however absurd or implausible the interpretation may be, then the only possible result is to strike out the entire section of the agreement.”

Similarly, in Nutting v Franklin Templeton Investments Corp., the Alberta Queen’s Bench referred to *Oudin* and upheld a “minimum standards only” clause where it was found that the prescribed period of notice did not violate the minimum standards legislation and it was the express intent that this notice would “oust any other notice requirement that may have otherwise been implied.”

While it is still early days, these cases may signal a shift in the approach courts will take when interpreting “minimum standards only” clauses. The decisions illustrate a willingness to look to the intention of the parties and the contract as a whole in finding that termination payments were to be limited. Of note, Mr. Oudin has filed leave to appeal to the Supreme Court of Canada. We will monitor that leave application, and as well we will continue to monitor developments in this area as 2017 progresses.

In the meantime, as the law in this area continues to evolve, employers should continue to be vigilant when drafting the termination language of an employment contract to minimize the risks of a subsequent finding of unenforceability.

Medical Marijuana

It is difficult to go a day without hearing news about the legalization of both medical and recreational marijuana. While the law in this area is unsettled, employers are being challenged to answer questions from employees about how the changing legal landscape will affect the workplace.

A continuing trend in 2017 will be the interplay between medical marijuana and the law on accommodation. An increasing number of employees are receiving prescriptions for medical marijuana to treat various ailments. Employers, in turn, are faced with the prospect of having employees at work who have consumed marijuana in some form.

While employers have an obligation to accommodate employees with disabilities, employers also have an obligation to ensure a safe workplace for everyone. This includes ensuring all employees report for work fit and able to perform their jobs safely. It can be difficult to strike a balance between ensuring the employer is meeting its duty to accommodate while also ensuring that employees are not showing up for work “under the influence.”

Employers are best-served by treating medical marijuana as a form of prescription drug to ensure

the safe workplace standard is met. Ensure the employee knows his or her obligation to attend work fit and able to perform the job safely. Any use, or misuse, of medical marijuana that causes impairment should be addressed with the employee in the same way an employer would approach any other prescription medication that is causing impairment. If additional medical information is needed, work with the employee and the treating physician to get the information needed to make a proper decision.

Gender Identity

Both the provincial and federal governments recently announced a number of new gender diversity and inclusion legislative initiatives, and we anticipate efforts to increase awareness and protection to continue in 2017 and beyond.

In June of 2016, the Ontario government announced the removal of gender identification information from the face of Ontario health cards. The government also announced that commencing in early 2017, Ontarians will be offered a new, neutral “X” gender identification display option on Ontario Driver’s Licences for those individuals who do not identify as exclusively male or female.

Shortly after the Ontario government’s announcements, the federal government announced that it is exploring the use of gender-neutral options on federal identity documents (e.g. passports or Canada Revenue Agency documents), and is conducting a review of all the circumstances in which it requires or produces identity documents to ensure individuals whose gender identity does not match the binary standard are not excluded.

These new initiatives signal an increased focus at both levels of government on greater inclusivity and gender awareness issues. At this point, it remains to be seen what further action, if any, either government may take to mandate reforms for public or private sector employers. However, this trend towards greater awareness and inclusivity will continue and employers may want to be proactive in 2017 by addressing some of these issues through workplace policies and education to stay ahead of the curve.

These are just a handful of the trends we see emerging that employers should keep a close eye on as we enter 2017.

Top 10 Developments in Human Resources Law in 2016

By: Craig R. Lawrence

This past year saw a number of important developments in Human Resources Law. Here’s a quick overview of the top 10 worth noting as we begin the new year.

1. **Unjust Dismissal under the *Canada Labour Code***

The Supreme Court of Canada ruled in *Wilson and Atomic Energy of Canada Limited* that the "unjust dismissal" provisions of the *Canada Labour Code* (Code) prohibit without cause dismissals of non-managerial, non-unionized employees. The Court's decision marks a significant shift in the law for federally regulated employers, and holds that the Code completely displaces an employer's common law right to terminate without cause. In light of this decision, the Code's provisions provide employees with protection analogous to just cause protections enjoyed by unionized employees under collective agreements.

2. **Bill 132 and Workplace Sexual Harassment**

On September 8, 2016, amendments to the *Occupational Health and Safety Act* (OHSA) came into effect under Bill 132. Building upon the substantive obligations introduced in 2010 to prevent workplace violence and harassment, Bill 132 introduces additional obligations for employers to prevent and address workplace sexual harassment.

Bill 132 requires employers to update their workplace violence and harassment policies and programs to expressly address workplace sexual harassment – a concept that is broader under OHSA than the concomitant obligation under the Ontario *Human Rights Code* to prevent harassment based on protected grounds, such as sex, gender identity, or sexual orientation. In addition to reviewing and revising their policies and programs on an annual basis, employers are required to provide workers with appropriate training on the contents and obligations under those policies and programs.

Has your organization amended its policy to account for these changes?

3. **The Life and Death of the ORPP**

This year began with the Ontario government providing additional details on its plans to introduce the Ontario Retirement Pension Plan (ORPP), including implementation dates and contribution requirements. By June, however, it was clear that the ORPP had met an early demise in the face of a renewed commitment by the federal government to expand the Canada Pension Plan (CPP). In December, legislative reforms to the CPP were enacted under Bill C-26, which included three key enhancements:

i. Increasing the target income replacement from 25% to 33% of pensionable earnings;
ii. An increase of 14% to the maximum amount of earnings subject to CPP; and,
iii. Higher contributions from both employers and employees to fund the higher benefit formula and higher earnings limit.

The enhancements will be phased-in starting on January 1, 2019. Given the impact the proposed

changes could have on existing defined benefit and defined contribution plans, particularly with a change in yearly maximum pensionable earnings, we strongly encourage you to contact any member of our Pension, Benefits and Executive Compensation Group or your regular Hicks Morley lawyer.

4. **Changing Workplaces Review**

Since May 2015, two special advisors to the Ontario government have been engaged in a review of our changing workplaces, with a view to better understanding the causes of those changes, and whether reforms should be made to the Ontario *Employment Standards Act, 2000* (ESA) or the Ontario *Labour Relations Act, 1995* (LRA).

In July 2016, the special advisors released the Changing Workplaces Review Interim Report (the Interim Report), summarizing their efforts and findings to date. In particular, the Interim Report focuses on vulnerable workers engaged in precarious employment, and identifies the substantive areas of the ESA and LRA that are under consideration, including:

ESA	LRA
• Extending the ESA to cover independent and dependent contractors • Narrowing or eliminating overtime and excess hours of work exemptions • Overhauling the application and use of personal emergency leave • Introducing paid sick leave.	• Returning to a card-based certification process • Introducing automatic first-contract interest arbitration • Prohibiting the use of replacement workers during a strike • Overhauling the related employer provisions to provide for joint employer declarations.

Importantly, the Changing Workplaces Review remains ongoing, and final recommendations are still pending.

5. **New Policies at the Ontario Human Rights Commission**

Over the course of 2016, the Ontario Human Rights Commission (Commission) released a number of new or revised policies, including:

i. Sexualized and gender-specific dress codes
ii. Ableism and discrimination based on disability
iii. Drug and alcohol testing.

These policies reflect the Commission's interpretation of the *Human Rights Code*, and are frequently referenced in decisions of the Human Rights Tribunal of Ontario. When was the last time your policies on these issues were reviewed for compliance?

6. **Overhauling the WSIB Ratings System**

The Workplace Safety and Insurance Board is currently engaged in an extensive review of the way in which it classifies Schedule 1 employers and sets their premium rates. This review will result in a significant overhaul to the rating and cost systems currently in place, and may include modifications to the maximum premium rate, divisions between multiple business activities, and additional changes aimed at providing greater accountability and flexibility.

7. **Liability for Workplace Injuries**

In a stark reminder of the potential liabilities faced by managers and senior personnel under the OHSA, a project manager at Metron Construction Company was sentenced to 3.5 years in jail earlier this year for his role in a fatal workplace incident.

On Christmas Eve in 2009, four workers were killed while repairing balconies on the 14th floor of a high-rise building when the scaffolding they were working on collapsed. The Superior Court found that the project manager responsible for the work was aware that there were insufficient lifelines on the scaffolding, yet failed to take reasonable steps to protect the workers. In sentencing the project manager to 3.5 years in jail, the Court expressly noted that the sentence was necessary to reflect the terrible nature of the offences.

8. **The Ontario Court of Appeal on the Duty to Mitigate in a Fixed Term Contract**

In the latest lesson on the importance of a carefully drafted employment contract, the Ontario Court of Appeal reinforced the principle that there is no duty to mitigate when a contract specifies a penalty for early termination. In Howard v Benson Group Inc., the Court of Appeal held that in the absence of a provision to the contrary, an employer who terminates an employee prior to the end of a fixed term contract is obligated to pay out the contract to the end of the term, and that obligation is not subject to mitigation.

As more employers turn to the flexibility afforded by temporary or fixed term employment arrangements, precise contract drafting is essential to ensure your organization is protected in the event of early termination.

9. **The Ontario Court of Appeal Addresses Remedial Authority of the HRTO**

The Ontario Court of Appeal upheld a decision of the Human Rights Tribunal of Ontario (HRTO) in *Hamilton-Wentworth District School Board v Fair* in which the HRTO reinstated an employee who

had been terminated more than 10 years earlier. The Tribunal held that the employer had failed to accommodate the applicant, and expressly rejected the employer's argument that reinstatement would be unfair in light of how much time had passed.

The Court of Appeal held that the mere passage of time does not, by itself, make reinstatement inappropriate. The Court's decision is an important reminder to employers that the risk of reinstatement remains significant even in cases that take a considerable period of time to be heard and resolved.

10. **Dependent Versus Independent Contractors**

The last few years have seen considerable developments in the law surrounding the rights and entitlements of contractors. In particular, the distinction between dependent and independent contractors can carry significant consequences for employers, with the former now being entitled to reasonable notice of termination – a parallel entitlement to that enjoyed by employees.

This past year, the Ontario Court of Appeal addressed the proper approach for determining whether an individual is a dependent or independent contractor in *Keenan v Canac Kitchens Ltd*. In upholding a decision that awarded 26 months' notice to dependent contractors, the Court of Appeal held that determining whether someone is dependent cannot be done with a "snapshot" approach. Rather, dependency must involve a consideration of the full history of the relationship in order to assess whether the relationship was one of economic dependency due to exclusivity.

Featured Lawyer

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