Minimum Standards Monitor

Recent Minimum Standards Cases of Note

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In this Minimum Standards Monitor, we discuss two recent cases of interest to employers. In the first, an arbitrator found that an employee returning from maternity/parental leave was not entitled to the exact same work conditions which she left, even though the original job still existed. A comparable replacement position was sufficient. In the second, an employment standards tribunal found that a medical marijuana producer was subject to provincial, not federal, employment standards legislation.

Arbitrator: Employee Returning From a Leave is Not Entitled to the Exact Same Work Conditions They Left, Even if Original Job Still Exists

By: Nadine Zacks

A labour arbitrator recently considered whether an employee is entitled to the exact same job they left when they commenced a leave of absence under the *Employment Standards Act, 2000* (ESA). In a decision which provides some comfort to employers dealing with constantly evolving workplaces and specific client or customer requests or demands, the answer was “no.”

Subsection 53(1) of the ESA provides that an employee who takes a statutorily-protected leave under the ESA is entitled to be reinstated to “the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.” Issues arise when the temporary replacement develops a better relationship with clients or customers than the employee on leave and clients demand that they continue to work with the replacement. Arbitrator von Veh recently found that where a client did not want the original employee to return to the position, instead favouring the temporary replacement, the original employee was not entitled to the original position and instead must simply be offered a replacement position.

In United Food and Commercial Workers International Union, Local 333 v. Paragon Protection Ltd.

(Ellis Grievance), the grievor worked for a company which provided security and concierge services to multiple buildings in the city. She was a security guard/concierge at a condominium building and took maternity and parental leave under the ESA. Upon reaching out to discuss her return to work, she was advised that the building operator/superintendent at the building she had previously worked at requested that she not return to that building, as he was happy with the replacement worker who had been hired to temporarily take over during her leave and did not want any further turnover at the condominium site. As a result, she was offered two other concierge positions at other buildings operated by her employer, which offered comparable duties and responsibilities, hours of work, wages, and commuting distance. The grievor refused to accept either of these positions, and grieved, among other things, that the employer's failure to return her to the building at which she had previously worked violated the ESA since the position "still exists."

The arbitrator rejected this argument, finding that there had been no violation of the ESA. In coming to this conclusion, he took into account the industry in which the grievor worked and the terms of her employment. Specifically, she had agreed that she was interested in "mobile" work and that she would work any shift assigned to her. The collective agreement that governed her employment also specifically contemplated that an employee could be removed from their work site as a result of a written client request and in such circumstances the company was required to make a reasonable effort to place the employee at another site (within a reasonable distance from the employee's home). The collective agreement also contemplated that employees could be transferred from one location to another.

The arbitrator found that, following a leave of absence, a reinstatement was to be facilitated so that the grievor could continue employment in a comparable position if the original position was not "reasonably available." In assessing the employment position to which the grievor is to return, a number of factors must be considered including the duties and responsibilities previously performed, wages and benefits paid, as well as the location, hours, and conditions of work. One must also look at the "normal dynamics of a particular workplace." The ESA does not guarantee "absolute freedom from change." When applied to this case, the arbitrator found that the duties, responsibilities, wages, benefits, and conditions of work were the same at all three locations, and one location offered was closer to the grievor's house while the other was only 5 km further. In looking at the dynamics of the workplace, the arbitrator noted that even without a maternity leave, the grievor's workplace could have been altered by the employer and returning her to the exact same location would in fact have given her superior rights by virtue of her maternity leave than other employees. As a result, the employer did not violate the ESA.

Key Takeaways

This case provides helpful guidance to employers who have multiple employees performing the same duties, even though such duties may be performed at different locations or servicing different client groups, as it confirms that an employee is not entitled to the **exact same conditions** of work that they left, particularly if the terms of employment contemplate that some of these conditions

may change over time. As long as an employer can satisfy that the duties and responsibilities, wages and benefits, location, hours and conditions of work are all the same or comparable, an employer is entitled to return an employee to work with slightly different conditions than the employee enjoyed prior to the leave. While this issue most often arises upon a return from maternity or parental leave, the same principles apply to any statutorily-protected leaves under the ESA.

Tribunal finds Medical Marijuana Producer Subject to Provincial Employment Standards Legislation

By: Sunny Khaira

As the use of medical marijuana continues to rise and as the federal government prepares for the legalization of cannabis with the introduction of Bill C-45, the *Cannabis Act*, we can expect a significant growth in the cannabis production industry. With this growth comes an important question – are the producers of medical marijuana subject to federal or provincial minimum standards legislation?

This question was addressed in a British Columbia Employment Standards Tribunal (Tribunal) decision, Suncoast Health Corp (Re).

Suncoast involved an appeal from an employer who operates a medical marijuana production facility. Claimants had filed an unpaid wage complaint which subsequently resulted in a determination (Determination) against the employer for payment of unpaid wages, overtime pay, statutory holiday pay and vacation pay.

The employer appealed the Determination and raised the interesting issue of whether the complaints should have been filed under federal, rather than provincial, minimum standards legislation.

The employer took the position that its employees were producing medical marijuana, which was in the area of federal jurisdiction, and therefore the federal minimum standards legislation should apply. The Tribunal disagreed. It found that the fact Suncoast was engaged in the business of producing and selling medical marijuana under federal licences issued by the federal government did not automatically determine the federal/provincial jurisdiction question.

The Tribunal acknowledged that while the *prohibition* of the production and sale of marijuana is a matter that falls within the federal government's exclusive constitutional jurisdiction over criminal law, that did not mean the *lawful* production of medical marijuana is subject to federal minimum standards legislation. Rather, the employer's medical marijuana production operation was akin to an agricultural production facility. A similar conclusion was reached by the Ontario Labour Relations Board in MedReleaf, in which that Board found that the production of medical marijuana

was an agricultural activity and therefore within provincial jurisdiction.

As such, the Tribunal rejected the employer's position that the medical marijuana industry was exclusively under federal legislative jurisdiction and found that the employer's business operations were subject to provincial regulation since they were fundamentally agricultural in nature. Therefore, its operations were subject to provincial employment standards legislation.
