Federal Post

Looking Forward to 2020

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In our year-end *Federal Post*, we review changes to federal labour and employment laws which are anticipated to come into force in 2020. We also provide a quick update on some unjust dismissal cases of note.

As always, our best wishes for a happy holiday season.

Incoming Legislative Changes in 2020

The past few years have seen a flurry of legislative change to federal labour and employment laws.

We have previously reported on the changes to the *Canada Labour Code* (Code), many of which came into force over the past year.

But more changes are coming, both to the Code and in other areas. Set out below is a quick survey of what to watch for in 2020.

Canada Labour Code

Numerous Code amendments are still awaiting proclamation, including:

- a new Part IV, “Administrative Monetary Penalties”
- a new regime for harassment and violence in the workplace
- new mechanisms for unjust dismissal complaints
- changes to the termination of employment (group / individual) provisions
- equal pay for part-time, casual, temporary and seasonal employees
- prohibitions related to temporary agencies.

Modernizing Federal Labour Standards: Reprise

In addition to the Code changes which have already been passed, in February 2019 the federal government convened an independent Expert Panel on Modern Federal Labour Standards to study and consult on issues relating to a federal minimum wage, labour standards protections for non-standard workers, the right to disconnect, access and portability of benefits and a collective voice for non-unionized workers. The Panel was to report back to the Minister at the end of June 2019.

Federal Pay Equity

The federal *Pay Equity Act* was enacted by Bill C-86, *Budget Implementation Act, 2018 No. 2*, which passed in December 2018. It will apply to federally regulated employers with more than 10 employees and will include the federal private and public sectors, among other federal workplaces. Employers will be required to establish a pay equity plan within three years of becoming subject to the Act.

The Act has not yet been proclaimed into force but it is expected to come into force in 2020.

Pay Transparency

Bill C-97, the *Budget Implementation Act, 2019, No. 1* amended the *Employment Equity Act* to enact pay transparency requirements. The amendment will require federally regulated private sector employers to provide, in addition to the existing reporting requirements under the Act, any other information relating to the salary of its employees as may be prescribed. In August, 2019, the government invited submissions from stakeholders on draft regulations relating to pay transparency.

This change is expected to come into force sometime in 2020.

Diversity Requirements under the *Canada Business Corporations Act* (CBCA)

Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act, and the Competition Act* amended the CBCA to require that information relating to diversity among directors and members of "senior management" be provided to shareholders. Amendments to the *Canada Business Corporations Regulations, 2001*, registered on June 25, 2019, define the prescribed diversity information and the rank of senior management captured by the new reporting requirements. In accordance with the Regulations, these disclosure requirements will apply to all distributing corporations.

This amendment comes into force on January 1, 2020.

New Obligations under CBCA When Considering the Best Interests of the Corporation

Bill C-97*, Budget Implementation Act, 2019, No. 1*, amendments to the CBCA require corporations to consider the interests of employees, retirees and pensioners when making decisions in the best interests of the corporation, as well as providing prescribed information relating to the well-being of employees, retirees, and pensioners at shareholder meetings. The terms "retirees" and "pensioners" will be defined by regulation.

These provisions are not yet in force.

Bill C-81, *Accessible Canada Act*

On July 11, 2019, Bill C-81, the *Accessible Canada Act*, came into force. The Act is accessibility legislation which impacts certain federally regulated employers. Its stated purpose is to benefit all persons, especially persons with disabilities, with a "Canada without barriers" in specified areas, including employment and the built environment. Among other things, the Act establishes the Canadian Accessibility Standards Development Organization. Its mandate includes developing accessibility standards which set out how organizations can identify, remove and prevent barriers, and making recommendations on the standards to the Minister.

The accessibility standards will be established by regulation, which have not yet been registered.

Unjust Dismissal – Recent Cases of Note

In 2019 there were a number of unjust dismissal decisions which we think will be of interest to employers, summarized below. As always, the results in these cases are not necessarily indicative of how other cases will be determined, but they do establish helpful precedents for federally regulated employers dealing with actual or potential unjust dismissal claims.

Reinstatement is Not the Default Remedy

In *Kouridakis v. Canadian Imperial Bank of Commerce*, the Federal Court upheld a decision of an adjudicator under the Code

which found that the applicant was not dismissed for cause but that compensation, not reinstatement, was the appropriate remedy. It stated that reinstatement is not the "default" remedy under the unjust dismissal provisions of the Code and that there is no onus on the employer to prove why reinstatement is not appropriate.

Among other things, the Court stated that the Federal Court of Appeal had made clear that reinstatement "is not a right; it is simply one of the remedies available to an arbitrator." In addition, an adjudicator has "full authority" to determine whether reinstatement is appropriate. The Court also stated that an employer does not have the burden of showing why reinstatement is not possible.

Discontinuance of a Function

Adjudicator Horan determined that he had no jurisdiction to consider an unjust dismissal complaint as the complainant's employment had been terminated due to the discontinuance of a function. In ***Maki v. Bank of Montreal, Re*** 2019 CarswellNat 6756, the Adjudicator found that the work of the complainant, who was based in Toronto, had been transferred to Montreal due to the centralizing of functions by the Bank. The Bank had acted in good faith and no one in the Toronto location was now performing the work previously done by the complainant.

In dismissing the complaint, the Adjudicator stated that a *prima facie* case of "bad motive" had not been established and the employer had a clear and reasonable explanation for choosing the complainant for lay off. (*Bank of Montreal was successfully represented by Frank Cesario and Amanda Cohen of Hicks Morley*)

When Do Damages for Unjust Dismissal End?

In ***Curran and MAG Aerospace Canada Corp****., Re* 2019 CarswellNat 4803, the complainant was a pilot who worked on a seasonal basis for the employer (or its predecessors) and was about to start a six month contract when the contract was terminated. He sought replacement income for a number of years into the future (reinstatement was not sought) as his income had fluctuated. In this decision on remedy, Adjudicator Sinding made the following comments:

- he was "statutorily directed to attempt to "make whole" the unjustly dismissed employee, rather than limit [himself] to the common law approach to damages"
- "even where reinstatement is not ordered, wage compensation for a make whole remedy does not continue indefinitely but rather ends at either the date of the hearing or soon after, on the date of the decision."

The Adjudicator rejected the complainant's argument that he was entitled to losses into the future, as he had chosen to limit his employment to six month contracts. Damages were therefore assessed from the termination date to the date of the decision. The complainant also argued that due to family necessity he took a short term position that paid well but it was not the career he would have chosen. The Adjudicator stated that an "employer cannot be held responsible for a potential decline in an employee's life-long income, based on the employee's choices." As a result of the complainant's job choice, he had almost completely mitigated any damages arising from his dismissal.

No Unjust Dismissal Where Termination Due to Poor Performance

Two recent decisions are helpful to employers who have placed poor performing employees on progressive discipline.

In ***Bott v. Shaw Cablesystems Ltd***., 2019 CarswellNat 3038, the complainant had not met performance expectations and was dismissed for cause. He brought an unjust dismissal complaint seeking reinstatement. He argued, among other things, that his performance had met or exceeded expectations in many cases, some mistakes had "shared responsibility" and he was not given a timeline for improvement.

Adjudicator Gunn stated the employer established that the complainant consistently failed to meet expectations. It had

applied progressive discipline to deal with the complainant's performance, which included, over a period of time, a verbal warning, a written warning, a two-day suspension with a final written warning, and then termination of employment. Expectations were clearly communicated to the complainant, he was given an opportunity to improve and in fact had met several times with his supervisor to review incidents that had occurred and to review what was expected.

There was "overwhelming evidence" with respect to the cause for dismissal and the complaint was dismissed.

In ***Hedlund and Perimeter Aviation GP Inc., Re*** 2019 CarswellNat 5125, Adjudicator McLandress upheld the dismissal for cause of the complainant, a licenced Aircraft Maintenance Engineer. The employer operated a commercial regional airline, a safety-sensitive and heavily regulated industry. The facts established that the complainant had received extensive training, including the regulatory requirements regarding record-keeping, and had repeatedly failed to perform his job properly. He had received verbal and written warnings, as well as two suspensions. The culminating incident was the complainant's failure to detect a damaged de-icing boot on the tail section of a Dash 8. His employment was terminated the following day.

The Adjudicator considered the complainant's evidence that he had reported the defect to his Crew Chief but did not create a reporting card as he'd been told to "carry on." The Adjudicator found the Crew Chief to be the more credible witness and accepted his evidence that the defect had never been reported to him.

The Adjudicator stated that the "nature of this particular industry is a highly relevant consideration in assessing whether dismissal is the appropriate remedy." The complainant understood what was expected of him, had been suspended twice over the space of three months for poor performance and had been advised that failure to meet expectations could result in dismissal. The complainant was aware that a serious mistake could result in fatalities. His evidence that he detected the defect on the Dash 8 and had reported it was not credible; even if that evidence was accepted, the Adjudicator stated that failure to follow proper reporting protocols for reporting the Dash 8 defect would have warranted discipline as well. The complaint was dismissed.
