Labour Notes®

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Dress Your Workplace Attire Policy Appropriately 2

Progress of Legislation

Federal 4

Alberta 4

Manitoba 5

Nova Scotia 6

Ontario 6

Prince Edward Island 8

Quebec 9

Did You Know 9

Recent Cases 9

APPEAL COURT CONFIRMS THAT EMPLOYER'S FINANCIAL CIRCUMSTANCES NOT A FACTOR IN DETERMINING REASONABLE NOTICE

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Are an employer's financial circumstances a relevant consideration in determining the period of reasonable notice to which a wrongfully dismissed employee is entitled?

This is the question the Court of Appeal for Ontario was asked to decide in *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801, where the motion judge had reduced damages in lieu of reasonable notice owing to the plaintiff employees because of the poor financial position of their former employer. The Court answered the question in the negative — an employer's financial circumstances are not a relevant consideration in calculating a reasonable notice period.

The three employees in this case were dismissed from employment as teachers with their employer, a school. Following the dismissal, the employees filed a claim for wrongful dismissal and sought damages for pay in lieu of reasonable notice. The employer initially took the position that the teachers were employed on fixed term contracts and were not entitled to reasonable notice.

The matter proceeded by way of summary judgment. The motion judge found the teachers were in fact employed for indefinite periods (a finding which was not appealed) and were therefore entitled to reasonable notice at common law. With respect to the appropriate notice period, the motion judge held that the poor financial circumstances of the employer was a component of the plaintiffs' "character of employment" and therefore a relevant consideration in fixing the reasonable notice period. Accordingly, the notice periods were reduced from the plaintiffs' proposed 12 months' notice to 6 months.

The plaintiffs appealed and took that the position that the financial health of their former employer was irrelevant in determining the appropriate reasonable notice period. The Court of Appeal agreed. It confirmed the relevant factors in determining the reasonable notice period are those set out in *Bardal*, which focus on the circumstances of the employee, not the employer: age, years of service, the character of employment and the availability of similar employment.

The Court accepted that an employer's financial circumstances may well be the reason for a termination and therefore the event which gives rise to an employee's right to reasonable notice. However, financial circumstances are not relevant in determining what that notice period will be—"they justify neither a reduction in the notice period in bad times nor an increase when times are good."

Because there has been some confusion in the case law with respect to the relevance of an employer's financial situation on the calculation of the notice period, the Court stated:

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> [22] It is important to emphasize, then, that an employer's poor economic circumstances do not justify a reduction of the notice period to which an employee is otherwise entitled having regard to the *Bardal* factors. [...]
>
> [23] Thus, even assuming that the respondent was suffering financial difficulties when it dismissed the appellants, the motion judge erred in concluding that the period of notice to which the appellants were entitled should be reduced as a result. That conclusion is neither required by the case law nor consistent with the nature and purpose of an employee's right to notice.

With this decision, the Court has clarified any prior uncertainty in the case law as to whether an employer's financial circumstances are an appropriate consideration in the reasonable notice analysis: they are not.

DRESS YOUR WORKPLACE ATTIRE POLICY APPROPRIATELY

— Kim G. Thorne and David S. Louie of Roper Greyell LLP—Employment and Labour Lawyers.

A management restriction on employees wearing blue jeans and shorts at the office was found by an arbitrator to be a contravention of the employer's established workplace attire policy in *Canadian Union of Public Employees, Local 1767 v. BC Assessment Authority (Workplace Attire Grievance)*, [2015] B.C.C.A.A.A. No. 67 (Dorsey), and the restriction was ordered to be rescinded.

Background

The employer, the British Columbia Assessment Authority ("BC Assessment"), conducts real property assessments throughout British Columbia for taxation purposes. BC Assessment operates 15 field offices throughout the province where property owners and other stakeholders can obtain information. On average, there are seven face-to-face counter inquiries per day per office.

In October 2010, BC Assessment adopted a Workplace Attire Policy (the "Policy") which read, in part:

> BC Assessment is recognized as a professional services agency and our image is communicated to the public and our clients in part by our employees' attire.
>
> ... [I]t is our expectation that employees will come to work wearing appropriate and professional attire. Common sense, reasonableness and good judgment should prevail when selecting work attire that is appropriate for the intended activity and in accordance with WorkSafe BC and any other safety considerations.

In March 2014, management in the Kelowna office announced a general restriction on the wearing of blue jeans and shorts in the office at all times. Blue jeans were permitted on "Casual Wednesdays". Blue jeans and shorts would continue to be acceptable for field work as long as employees complied with any relevant health and safety regulations. The union grieved the restriction.

Arguments

The union argued that the Policy did not permit local managers to impose blanket restrictions prohibiting blue jeans or shorts. According to the union, the Policy granted the employees a choice regarding whether and when to wear blue jeans or shorts. The union argued that the restriction was an unreasonable, unilaterally introduced employer rule. There was, the union said, no objective evidence to rationally justify the restriction.

The employer responded that it had the right to establish reasonable workplace attire rules. It maintained that professional attire is important for its image and credibility in work situations. It argued that some employees might not know what appropriate business casual attire is and might deliberately "push the envelope" by dressing in articles of clothing like a kilt, Hawaiian shirt, and running shoes.

Decision

Arbitrator James Dorsey, Q.C., began his analysis by referencing the traditional test regarding management's right to unilaterally make and implement workplace rules, *KVP Co. Ltd.* (1965), 16 L.A.C. 73 (Robinson). The KVP test was recently cited with approval by the Supreme Court of Canada in *C.E.P., Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34.

The arbitrator held that the reasonableness of a unilaterally introduced employer rule that restricts an employee's appearance, including choice of attire, involves a balancing of the legitimate business interests of the employer and the personal rights and autonomy of the employee.

Arbitrator Dorsey made reference to existing case law which holds that an employer must, at the very least, demonstrate that the appearance of its employees is important for the company's image and could result in a loss of business. The arbitrator emphasized that objective evidence must be presented which amounts to more than mere "impressionistic" evidence that the employer's legitimate interests will be adversely affected in the manner it predicts.

In this case, Arbitrator Dorsey found that management's restriction on jeans and shorts limited the autonomy expressly given to the employees in the Policy. In so doing, management substituted its judgment for the judgment afforded to employees in the Policy and this fettered the employees' exercise of good judgment.

Arbitrator Dorsey held that the employer's reliance on generally accepted standards for business attire was insufficient to justify the limitation. There was no objective evidence that the wearing of blue jeans or shorts threatened or had some kind of prejudicial effect on the employer's image. Accordingly, the blanket restriction in the Kelowna office was inconsistent with the Policy and was unreasonable. Arbitrator Dorsey ordered that the restriction be rescinded.

Fashioning a Dress Code

When implementing a unilateral workplace rule such as a restriction on workplace attire, employers must bear the KVP test in mind and ensure that the rule: (1) is consistent with the applicable collective agreement; (2) is reasonable; (3) is clear and unequivocal; (4) was brought to the attention of the employees affected before the employer acted on it; and (5) was consistently enforced since it was introduced.

Employers should be mindful of existing policies when unilaterally introducing workplace rules with respect to dress codes. It is important to ensure that any restrictions imposed on employees are consistent with any policies which might already be in place. If employers do intend on imposing such restrictions, they should have concrete, tangible evidence that business reputation and financial well-being would be adversely affected in the absence of the restrictions; the dress code may otherwise be held to be unreasonable and unenforceable. Remember when assessing the validity of such restrictions that arbitrators will balance the legitimate business interests of the employer against the personal rights and autonomy of employees.

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PROGRESS OF LEGISLATION

New Penalties Regime Now in Force Under the *Immigration and Refugee Protection Regulations*

Effective December 1, 2015, a new division entitled "Administrative Monetary Penalties and Other Consequences for Failure to Comply with Conditions Imposed on Employers" came into force as part of the *Immigration and Refugee Protection Regulations and applies to violations that occur on or after that date*.

That new division created a detailed disciplinary regime applicable to employers of foreign nationals under the Temporary Foreign Worker Program ("TFWP") and the International Mobility Program ("IMP") who are not in compliance with certain conditions and where the failure to comply is not justified. Penalties for non-compliance include fines (known as "administrative monetary penalties") and program bans of varying length, as well as publication of the non-compliant employer's information. According to the new division, its purpose is to promote compliance rather than to punish.

Violations are classified as either Type A, Type B, or Type C, depending on their nature. Additionally, the size of the employer (whether the violations were committed by individuals or small businesses—defined as businesses with fewer than 100 employees or less than $5 million in annual gross revenues—or by large businesses), severity, and any previous infraction history are among the factors that impact a points system used to determine the amount of an administrative monetary penalty and/or the length of a ban from participation in the TFWP and IMP.

Administrative monetary penalties vary from a low of $500 to a high of $100,000 per violation. Notably, where a violation affects more than one foreign national, it is treated as a separate violation for each foreign national affected. Where there are multiple violations, monetary penalties are cumulative, up to a maximum of $1 million. There is also a maximum penalty of $1 million per employer within a 12-month period. Periods of program ineligibility can range from one year to 10 years. As well, in the case of extremely serious violations, permanent bans can result. Where multiple violations result in more than one period of ineligibility, only the longest period is applicable.

There are also new provisions designed to encourage employers to self-report violations by way of voluntary disclosure. In certain situations, an employer's decision to make a voluntary disclosure may result in a reduction of the applicable penalties.

Where an officer or the Minister is satisfied that an employer has committed a violation, a notice of preliminary finding must be issued. The employer will have up to 30 days after receipt of a notice of preliminary finding to make written submissions before a notice of final determination is issued.

When a final determination has been issued, information about the employer, its violation(s), its eligibility status, and any applicable penalty must be published on one or more Government of Canada websites. The only exception to this is where the notice of final determination contains a warning, but no administrative monetary penalty.

Proposed Amendments to *Alberta Human Rights Act* To Protect Gender Identity and Expression Progress

Bill 7, the *Alberta Human Rights Amendment Act, 2015*, received third reading on December 7, 2015. Bill 7, if passed, would explicitly protect gender identity and gender expression as prohibited grounds of discrimination under the *Alberta Human Rights Act*.

Alberta Bill To Extend Employment Protections to Farm and Ranch Workers Progresses

Alberta's Bill 6, the *Enhanced Protection for Farm and Ranch Workers Act*, received second reading on December 9, 2015. If passed, Bill 6 would amend a number of employment law enactments, including the *Employment Standards Code*, the *Employment Standards Regulation*, the *Labour Relations Code*, the *Workers' Compensation Regulation*, and the *Occupational Health and Safety Act* to remove certain exemptions to workplace protections that currently exist for farm and ranch workers.

If passed, Bill 6's amendments to the employment standards and labour relations enactments would come into force on proclamation. Changes to workers' compensation and occupational health and safety enactments would come into force on January 1, 2016.

Additionally, the Alberta government announced, on December 7, 2015, its intention to amend Bill 6 to exclude farm and ranch owners (and their families) and volunteers from the mandatory application of occupational health and safety and workers' compensation provisions. The press release announcing these amendments to Bill 6 is available at: http://alberta.ca/announcements.cfm.

Manitoba Bill Would Establish New Leaves of Absence

Bill 8, *The Employment Standards Code Amendment Act (Leave for Victims of Domestic Violence, Leave for Serious Injury or Illness and Extension of Compassionate Care Leave)*, was introduced on November 25, 2015 and received second reading on December 3.

If passed, Bill 8 would amend *The Employment Standards Code* (the "Code") to create a new leave of absence available to employees who are victims of domestic violence and a new leave of absence available to employees who are seriously ill or injured. Bill 8 would also modify Manitoba's existing compassionate care leave and include amendments to various other leaves to clarify that the entitlements are unpaid.

Unpaid long-term leave for serious injury or illness of up to 17 weeks in any 52-week period would be available to employees who have been employed by the same employer for at least 90 days. In order to be eligible for this leave, a physician would need to issue a certificate setting out that the employee is expected to be incapable of working for at least two weeks due to a serious injury or illness. Employees who wish to take this leave would be required to provide their employer with as much notice as is practicable under the circumstances and to provide a copy of the physician's certificate as soon as possible. This leave would need to be taken in a single, continuous period, unless the employee and employer agree otherwise or a collective agreement provides otherwise. An employer could require the employee to provide a physician's certificate indicating the employee's fitness to return to work before the employee returns to work.

If Bill 8 is passed, domestic violence leave would also be available to employees who have been employed by the same employer for at least 90 days. This innovative leave of absence would entitle eligible employees to, within each 52-week period, up to 10 days of leave, intermittently or in a continuous period, and up to 17 weeks' leave taken in a continuous period. Bill 8 sets out certain purposes for which domestic violence leave can be taken. These are:

- to obtain medical attention for the employee or the employee's child with respect to a physical or psychological injury or disability caused by domestic violence;
- to obtain the services of a victim services organization;
- to obtain professional counselling;
- to relocate, either temporarily or permanently;
- to seek legal or law enforcement assistance (including preparation for participation in a civil or criminal proceeding related to domestic violence); and
- any other prescribed purpose.

Up to five days of domestic violence leave taken in a 52-week period could be paid leave. The employee would need to inform the employer which days, if any, are to be paid. Subject to collective agreement provisions to the contrary, an employer who provides paid leave benefits that are greater than the minimums required by the Code may oblige an employee to use those benefits for the paid days of leave. For paid leave, employees would be required to provide reasonable verification of the necessity of the leave, and for unpaid leave, employers would be able to request such verification. Additionally, the Code would be amended to provide employees who are not paid for leave under the domestic violence leave provisions with the ability to file a complaint within six months, and to impose record-keeping requirements on employers with respect to paid leave.

The existing compassionate care leave would be modified in several ways, including by extending the entitlement period for the leave from the current 30 days of employment to 90 days, and by extending the maximum duration of the leave from eight weeks to 28 weeks.

Another amendment contained in Bill 8 would require employers to "maintain confidentiality in respect of all matters that come to the employer's knowledge in relation to a leave taken by an employee" under the Leaves of Absence Division of the Code. Employee information related to a leave could only be disclosed to employees (or agents) who require the information to carry out their duties, where disclosure is required by law, or with the consent of the employee in question. Further, persons to whom such information has been disclosed could not disclose it to anyone else, "unless it is to be used for the purpose for which it was originally disclosed" or for a different authorized purpose. Failure to comply with these requirements would be an offence.

If passed, certain provisions in Bill 8 would come into force on Royal Assent, while others would come into force on a day fixed by proclamation.

Nova Scotia Bill That Would Modify Bereavement and Compassionate Care Leave Progresses

Bill 127, *An Act to Amend Chapter 246 of the Revised Statutes, 1989, the Labour Standards Code*, received third reading on December 8, 2015. As discussed more thoroughly in *Labour Notes* No. 1536, dated December 9, 2015, Bill 127 would amend the provisions related to bereavement leave and compassionate care leave. Bereavement leave for the death of certain family members would be extended to five days' unpaid leave. Employee entitlement to compassionate care leave would also be extended from eight to 28 weeks.

If passed, Bill 127 will come into force on January 3, 2016.

Nova Scotia Bill That Would Increase Employee Protection from Reprisals Progresses

Bill 128, *An Act to Amend Chapter 246 of the Revised Statutes, 1989, the Labour Standards Code*, received third reading on December 4, 2015. If passed, it would expand the scope of protection available to employees for asserting their rights under the *Labour Standards Code* (the "Code") to encompass (among others):

- persons who have assisted others in making complaints under the Code;
- persons who have initiated (or helped to initiate) inquiries, investigations, or proceedings under the Code;
- persons who have participated (or are about to participate) in any proceeding under an enactment;
- persons who have made inquiries into their rights or the rights of another person under the Code;
- persons who have made (or are about to make) a statement or provided information to the Director or to a labour standards officer that is required or permitted by the Code; and
- persons who have asked or required an employer to comply with the Code and its Regulations.

Bill 128 would come into force on the day that it receives Royal Assent.

Ontario Modifies Regulations under the *Employment Protection for Foreign Nationals Act, 2009*

On November 26, 2015, O. Reg. 348/15, was filed under the *Employment Protection for Foreign Nationals Act, 2009* (the "Act"). The new regulation, which is now in force, specifies that for the purposes of section 8(2) of the Act, which sets out a prohibition against employer recovery, an employer may recover or attempt to recover from a foreign national (or other prescribed person) "[c]osts of air travel and of work permits, if the employer is permitted to deduct such costs under an employment contract made pursuant to the Government of Canada program known as the `Seasonal Agricultural Worker Program'."

Also on November 26, 2015, the *Penalties* regulation (O. Reg. 47/10) made under the Act was amended by O. Reg. 349/15. While the penalty amounts remain the same, the amendments remove a restriction that limited the meaning of "individuals affected" by certain contraventions of the Act to foreign nationals employed (or who are attempting or have attempted to find employment) in Ontario as live-in caregivers or in other prescribed sectors or positions.

Bill That Restricts Use of Criminal Record Checks in Ontario Receives Royal Assent

The *Police Record Checks Reform Act, 2015*, SO 2015, c. 30 (the "Act"), received third reading on December 1, 2015 and Royal Assent on December 3. As discussed in greater detail in *Labour Notes* No. 1525, dated June 29, 2015, when it comes into force, the Act will regulate the process of obtaining police record checks for a variety of purposes, including determining a person's "suitability for employment".

A request for a police record check related to employment will have to be made in writing and will have to specify which of three types of check is being requested. Additionally, where a request is made with respect to an individual, it must contain that individual's written consent to the type of check being conducted. The three types are:

- criminal record check;
- criminal record and judicial matters check; and
- vulnerable sector check.

The information that must and must not be disclosed with respect to each type of check is contained in a Schedule to the Act. The Act will come into force on proclamation.

Bill That Amends Ontario's *Employment Standards Act, 2000* Receives Royal Assent

The *Strengthening and Improving Government Act, 2015*, SO 2015, c. 27 (the "Act"), received third reading on December 1, 2015 and Royal Assent on December 3. The Act contains amendments to a variety of Ontario Acts, including the *Employment Standards Act, 2000* (the "ESA"). The Act alters the third-party demand provision in the ESA.

Formerly, section 125(1) of the ESA provided that if the Director of Employment Standards ("Director") suspected that a person owed money to, or was holding money for, a person liable to make a payment under the ESA, the Director could demand that all or part of the money be paid to the Director in trust. The Act has expanded that provision to encompass situations where the Director suspects that a person may, within 365 days of the demand, owe money to, or hold money for, a person liable to make a payment under the ESA and to provide that a demand remains in force for 365 days from the date notice is served.

The amendments to the ESA contained in the Act came into force on the day it received Royal Assent.

Ontario Bill That Would Amend *Labour Relations Act, 1995* Progresses

Bill 144, the *Budget Measures Act, 2015*, has received second reading. Bill 144 contains provisions that would amend the *Labour Relations Act, 1995* with respect to the deemed abandonment of certain bargaining rights.

If passed, new provisions would provide that the Lieutenant Governor in Council may, by regulation, "deem bargaining rights held by an employee bargaining agency and its affiliated bargaining agents created as a result of the Sarnia Working Agreement to be abandoned with respect to the employer." Additional rights and obligations that apply with respect to relevant parties could also be imposed.

Bill 144 received first reading on November 18, 2015 and second reading on December 1.

Prince Edward Island Adds Two New Unpaid Leaves of Absence

On December 3, 2015, *An Act to Amend the Employment Standards Act* received Royal Assent, resulting in the creation of two new unpaid leaves of absence under the *Employment Standards Act*: leave related to critically ill child and leave related to crime-related disappearance or death of child.

Leave related to critically ill child is available to parents of one or more critically ill children. A "critically ill child" is one who is under 18 years of age on the day that a medical practitioner issues a certificate indicating that his or her life is at risk as the result of an illness or injury. The latest that the leave could end would be the end of the workweek in which the child dies or in which leave of 37 weeks in a 52-week period has been taken.

Leave related to crime-related disappearance or death of child of up to 52 weeks is available to parents of a child who has disappeared as the probable result of a crime and up to 104 weeks where the child has died as the probable result of a crime. For the purposes of this leave, "child" refers to a person who is under the age of 18. An employee charged with a crime that relates to the disappearance or death of his or her child is not entitled to this leave.

With respect to a child who has disappeared as the probable result of a crime, the latest that the leave could end would be the end of the workweek:

- that is 14 days after the child is found alive;
- that is 14 days since a change in circumstances has occurred which makes it no longer appear probable that the child's disappearance was the result of a crime;
- where 52 weeks have passed since the child's disappearance; or
- in which the child is found dead.

With respect to a child who has died as the probable result of a crime, the latest that the leave could end would be at the end of the workweek:

- that is 14 days since a change in circumstances has occurred which makes it no longer appear probable that the child's death was the result of a crime; or
- where 104 weeks have passed since the first day of the workweek during which the child was found dead.

For the purposes of both leaves, "parent" includes spouses of parents, adoptive parents, guardians, foster parents, and persons who have care and custody of a child. Entitlement to both leaves requires that a parent has been continuously employed by his or her employer for a period of three months or more. An employer "shall permit the employee to resume work in the position the employee held immediately before the unpaid leave of absence began or, if that position no longer exists, in a comparable position, with not less than the same wages and benefits the employee would have received if the employee had not been granted the unpaid leave of absence." Employees who take either of these leaves would have the option to maintain benefits under an employee benefit plan during the leave at his or her expense.

Employers are entitled to make written requests of employees to demonstrate entitlement to these leaves and employees are required to comply. In the case of a critically ill child, an employer could ask for a copy of a medical practitioner's certificate. The employer of a parent whose child has disappeared or died as the probable result of a crime could request reasonable documentation to support his or her entitlement to the leave.

Prince Edward Island To Increase Its Minimum Wage Twice in 2016

Prince Edward Island recently announced that two increases to its minimum wage are scheduled for 2016. On June 1, 2016, the minimum wage will increase from the current rate of $10.50 per hour to $10.75 per hour. Four months later, on October 1, 2016, the minimum wage will again increase, this time to $11.00 per hour.

Proposed Quebec Public Sector Whistle Blower Bill Would Amend *Act Respecting Labour Standards*

Quebec's Bill 87, *An Act to facilitate the disclosure of wrongdoings within public bodies*, received first reading on December 2, 2015. Bill 87 is intended to "facilitate the disclosure of wrongdoings committed or about to be committed within public bodies and to establish a protection regime against reprisals."

While much of the subject matter of Bill 87 is beyond the scope of this newsletter, there is a proposed consequential amendment to the *Act respecting labour standards* (the "Act") which should be noted. If passed, Bill 87 would expand the protection against reprisals section found at section 122 of the Act to capture employees who have made a disclosure of a wrongdoing in accordance with *An Act to facilitate the disclosure of wrongdoings within public bodies* or who have co-operated in an investigation or audit with respect to such wrongdoing.

If passed, Bill 87 would come into force on a day or days to be proclaimed.

DID YOU KNOW ...

... That the Human Rights Tribunal of Ontario Now Has a Practice Direction on Establishing a Regular Contact Person?

In November 2015, the Human Rights Tribunal of Ontario ("Tribunal") adopted a new practice direction entitled "Practice Direction on Establishing a Regular Contact Person for an Organization". Designed to reduce delays that result when an applicant names an incorrect contact person for an organizational respondent in a human rights application, the new practice direction allows organizations to designate a regular contact person for the delivery of human rights applications. Where such a person has been designated, the Tribunal will rely on that person as the contact for human rights applications, regardless of which person is named as the organizational contact in the application. It should be noted, however, that where individuals are named as respondents in human rights applications, they will continue to be treated as parties.

The new practice direction is available at: http://www.sjto.gov.on.ca/hrto/rules-and-practice-directions/.

RECENT CASES

Offer of Employment Letter Created Three-Year Fixed-Term Employment and Terminated Employee Was Awarded Damages for Unexpired Portion

Supreme Court of British Columbia, July 6, 2015

Alsip and Top Rollshutters Inc., doing business as Talius ("Talius"), entered into negotiations for Alsip to become director of sales. The original offer of employment was modified by a letter sent to Alsip to increase the annual salary, car allowance, and vacation time. In addition, a term was added that stated it was a "three year employment contract". Alsip began work as director of sales for Talius on October 4, 2012, and was terminated without cause on June 7, 2013. He was given two weeks' notice, and was offered a further six weeks' pay in exchange for a release of further claims. Alsip declined and brought a summary action for wrongful dismissal.

The action was allowed. The parties entered into an employment contract, with terms as set out in the letter sent to Alsip during negotiations. The letter was an offer of employment, which was on July 23, 2012. The contract provided that Alsip's start date would be as soon as possible after concluding his other employment, which was later specified to be October 4, 2012, although the contract was not changed or added to in any other way. The initial offer stated that the term would be "full-time and permanent", and after Alsip requested a three-year term, the final offer stated that it would be a "three year employment contract". Therefore, given that the parties clearly intended to create a three-year term, the contract was "full-time" until it was concluded. The contract did not include a provision providing for

termination on notice, and the plain meaning of a "three-year employment contract" was that it was for a fixed term. Alsip was entitled to damages for the unexpired portion of the contract, less the amount he earned in mitigation.

Alsip v. Top Rollshutters Inc., 2015 CLLC ¶ 210-059

Employer Failed To Demonstrate that Employee's Conduct Warranted Just Cause Dismissal

Court of Queen's Bench of New Brunswick, July 23, 2015

MacKinnon worked for Helpline Inc. ("Helpline") as a manager/coordinator, and received positive performance reviews. MacKinnon became frustrated with a "job shadowing" program involving board members of Helpline, and confronted one of the board members. The board chair met with MacKinnon to discuss her reaction to the situation. A reporter informed MacKinnon about rumours that the same board member whom she had confronted had experienced problems regarding the handling of finances at a church where he volunteered. MacKinnon discussed the rumours with a co-worker, MacDonald, who encouraged her to inform the board chair. MacKinnon met with the board chair to discuss the issue. MacDonald met with the board chair to complain about MacKinnon. Helpline investigated MacKinnon's conduct and discovered that she had threatened to bring the allegations against the board member to the press and referred to the board as a "sneaky bunch" in an email to MacDonald. MacKinnon was suspended, pending investigation, and then terminated for cause. She was given four weeks' pay. MacKinnon brought an action for wrongful dismissal.

The action was allowed. MacKinnon was not subject to the termination policy entitling Helpline to terminate employees for cause without notice, and setting out notice entitlements for other employees. The policy was implemented 13 years after MacKinnon started working for Helpline. There was no written agreement that she would be bound by the policy or any consideration provided in exchange for her loss of entitlement to reasonable notice. With respect to the termination, MacKinnon did not initiate the conversations with the reporter, and the reporter was not undertaking any investigative reporting on the board member. The alleged offensive emails between MacKinnon and MacDonald were sent outside of working hours from a personal account, and did not affect Helpline's reputation in the community or its relationship with clients. MacDonald, not MacKinnon, breached the confidence of the board by communicating with MacKinnon while she was on suspension, and informing her of the allegations against her. MacDonald was an instigator in the investigation of both the board member and MacKinnon. The board member at issue participated in the investigation of MacKinnon and was present when MacKinnon was confronted about the matter. MacKinnon herself was never given an opportunity to be heard by the board, nor was she given a warning or an opportunity to correct her behaviour. Helpline did not establish just cause, and MacKinnon was wrongfully dismissed. MacKinnon, who was 51 years old and had worked for Helpline for 16 years, was entitled to 18 months' reasonable notice. Her claims for aggravated and punitive damages were dismissed.

MacKinnon v. Helpline Inc., 2015 CLLC ¶ 210-060

Employee Was Wrongfully Dismissed and Discriminated Against

Ontario Superior Court of Justice, August 7, 2015

Strudwick worked for Applied Consumer & Clinical Evaluations Inc. ("ACCE"), where her duties included data entry and instructing recruiting staff. She became deaf, and claimed that ACCE's attitude toward her and treatment of her became unconscionable. According to Strudwick, she was constantly belittled, humiliated, and isolated, and her suggestions for accommodation in the workplace were ignored or refused. Strudwick belonged to a Toastmaster's Club that held meetings at ACCE's offices. The day after one of the meetings, Strudwick was terminated for insubordination and wilful misconduct as a result of her actions at the Toastmaster's meeting the previous day. Strudwick brought an action for wrongful dismissal. ACCE did not file a defence to her wrongful dismissal action, and was noted in default. The Court of Appeal refused to set aside that decision, and leave to appeal to the Supreme Court of Canada was denied. Strudwick sought default judgment.

The application for default judgment was allowed. Strudwick, who had worked for ACCE for over 15 years, was not provided with a Record of Employment after her termination, which made it difficult to obtain Employment Insurance benefits. In addition, the nature and manner of her dismissal was considered in awarding her 24 months' reasonable notice, along with benefits. She was awarded $20,000 for discrimination under the *Human Rights Code*, as ACCE failed to

consider or accommodate her deafness, despite repeated, reasonable, and varied requests. Strudwick was awarded $18,984 for the cost of psychological treatment for an adjustment disorder with mixed anxiety and depressed mood, resulting from the intentional infliction of mental distress. She was awarded $15,000 in punitive damages in order to deter ACCE and other employers from such conduct.

Strudwick v. Applied Consumer & Clinical Evaluations Inc., 2015 CLLC ¶ 210-061

Certification Application Filed Before a Legislative Change from Card-Based to Mandatory Vote System Was Handled in Accordance with Provisions in Existence at Time of Filing

Canada Industrial Relations Board, August 4, 2015

The Public Service Alliance of Canada (the "union") filed an application for certification for a group of employees at the Skookum Jim Friendship Centre (the "Centre"). At the time of the filing, the Canada Industrial Relations Board (the "Board") had the discretion under sections 28 and 29 of the *Canada Labour Code* (the "Code") to certify a union based on membership evidence, if it was satisfied that the evidence demonstrated majority support for the union. In a majority of cases, the Board relied on membership evidence, although it had the discretion to order a vote. The *Employees' Voting Rights Act* (the "EVRA") modified sections 28 and 29 of the Code to require the Board to conduct a representation vote for certification, and increased the required level of support to 40 per cent. The amendments removed all discretion to determine a date other than the date of filing an application to establish the level of support amongst employees. The union claimed that the Board should use the prior Code provisions, since the EVRA came into force after the union's application was filed, while the Centre claimed that the Board should follow the new requirements and conduct a vote.

The application for certification was granted. When a union files its application for certification with the necessary evidence of majority support in accordance with the statutory requirements at the time of filing, it has relied and acted on the law as it was, and its right to rely on the membership evidence to obtain certification has crystallized. Any new legislative provisions should not negatively impact or substantially change the significance of the evidence collected and submitted in support of the application. The changes made by the EVRA were more than procedural, and the impact of the changes should not interfere with any substantive rights or produce an unjust result. The EVRA altered the legal significance of the facts and evidence provided in support of the certification application, and there was no indication the changes would apply to, or affect, existing applications. It would be unjust to apply the new provisions in this situation, where the parties relied on the facts and membership evidence at the time of the application. Using the provisions in place prior to the EVRA coming into force, the unit was appropriate for collective bargaining, the union had majority support, and the certification was granted.

Public Service Alliance of Canada v. Skookum Jim Friendship Centre, 2015 CLLC ¶ 220-058

Union and Employer Applications for Judicial Review of Saskatchewan Labour Relations Board Decision Were Dismissed

Queen's Bench for Saskatchewan, August 5, 2015

Clean Harbors, based in the United States, owned various subsidiaries carrying on business in Alberta and Saskatchewan, including Clean Harbors Industrial Services Inc. ("CHIS") and BCT Structures ("BCT"). BCT, based in Alberta, began performing electrical work at the K+S site in Saskatchewan, and its staff on site included four electricians registered as apprentices in Alberta. Clean Harbors advertised for Saskatchewan workers to perform electrical work at the K+S site, and hired four additional Saskatchewan employees who were registered and certified to work in the electrical trade in Saskatchewan. The International Brotherhood of Electrical Workers, Local 2038 (the "union") filed a certification application to represent employees of CHIS, though CHIS claimed that the true employer was BCT. A mandatory workplace meeting of all employees was held on the K+S site. At the meeting, management personnel informed employees about the pending certification application, and reminded employees about their non-solicitation policy which prohibited discussion of union organization during work hours. Subsequently, three of the new employees from Saskatchewan were terminated, and the fourth employee resigned. The union brought two unfair labour practice

complaints relating to the terminations and allegedly improper workplace communications. The Saskatchewan Labour Relations Board (the "Board") found that BCT was the "proper employer" for purposes of the representation vote and certification application, and that Alberta employees should be included in the bargaining unit for voting purposes. In addition, the Board dismissed the union's unfair labour practice complaints with respect to the termination of three employees, and the eligibility of one employee to participate in the representation vote (see 2015 CLLC ¶ 220-023). The union and BCT each brought applications for judicial review.

The applications for judicial review were dismissed. In determining that BCT was the employer, the Board considered the overall context of the relationship to determine which entity was in control of the employees. This was a reasonable conclusion based on the facts. The Board had exclusive jurisdiction to determine who was eligible to vote, based on whether an employee had a "continuing and substantial connection to the workplace" on the date of the application and vote. It determined that Alberta employees were included in the bargaining unit, and that they were eligible to vote even if they were not registered in Saskatchewan. The Board did not err in deferring to the Saskatchewan Apprenticeship and Trade Certification Commission's evidence with regard to the operation of the apprenticeship program in Saskatchewan. The Board reasonably considered the standard Newbery unit description for electricians, applicable jurisprudence on voter eligibility, applicable legislation, and its own policies on under-inclusive bargaining units in making its decision. One employee, who eventually registered in Alberta, was eligible to vote since he worked in Saskatchewan for less than six months. The Board's finding of no anti-union *animus* in the termination of the three employees was reasonable.

With respect to BCT's application, the Board properly set out the law and applied it to the facts in determining one of the workers was not an employee at the K+S site on the certification application date and was not entitled to vote.

IBEW, Local 2038 v. Clean Harbors Industrial Services Canada Inc., 2015 CLLC ¶ 220-059

Human Rights Tribunal of Ontario Decision To Dismiss Management Employee's Discrimination Complaint About Derogatory Comments on Union Blog Was Reasonable in the Circumstances

Ontario Court of Appeal, July 3, 2015

The union's local president maintained a blog, which included two posts specifically naming Taylor-Baptiste, a deputy superintendent of the employer. One of the posts was written by the local president himself; the other one was written anonymously, although it was approved by the local president. The blog was read widely. The employer asked the local president to remove the blog's reference to managers. Eventually the local president complied and the blog site was made inaccessible without a password. The employer did not discipline the local president for the blog postings. Taylor-Baptiste brought a human rights complaint, alleging discrimination and harassment on the basis of marital status and sex. The complaint was dismissed, as the Human Rights Tribunal of Ontario (the "Tribunal") determined the blog comments did not constitute harassment in the workplace, and the comments were expressions of opinion and freedom of association protected under the *Canadian Charter of Rights and Freedoms* (the "Charter") (see 2012 CLLC ¶ 230-022). A request for reconsideration was dismissed (see 2013 CLLC ¶ 230-019), as was an application for judicial review (see 2014 CLLC ¶ 230-035). Taylor-Baptiste appealed.

The appeal was dismissed. The lower court properly examined the Tribunal's reasons as a whole, and properly determined that the key question was whether, in the particular circumstances of this case, the blog posts fell within subsection 5(1) of the *Human Rights Code* (the "Code"). Administrative bodies are required to consider Charter values within their scope of expertise, and in this case, the Tribunal was asked to determine whether a person's conduct had violated a statutory or regulatory rule. The Court was not entitled to interfere with the Tribunal's decision simply because the Tribunal considered Charter values in determining whether there was a violation of subsection 5(1) of the Code. The Tribunal thoroughly considered the objective of subsection 5(1), and identified freedom of expression and association as the relevant Charter rights at issue. It gave detailed, intelligible, and transparent reasons for its decision that the conduct of the union president did not constitute discrimination "with respect to employment", using a proportionate balancing of the statutory objective of subsection 5(1) and the Charter rights of freedom of expression and association.

Taylor-Baptiste v. OPSEU, 2015 CLLC ¶ 230-047

Canadian Human Rights Commission's Dismissal of Complaint Upheld by Federal Court of Appeal

Federal Court of Appeal, July 7, 2015

Bergeron, a lawyer with the Department of Justice ("Department"), was required to take sick leave after developing chronic fatigue syndrome. Four years into her leave, Bergeron indicated that she was ready to return to work. A physical assessment recommended a gradual return to full-time work over a period of seven months, and that she should stop work if she could not fulfill her work requirements or if "additional concerns" arose. Bergeron had concerns about the recommendations and her return-to-work date, and refused to meet and discuss her return. The Department changed its offer to remove all references to full-time hours, and to indicate that any decision to stop work would only be made after consultations. Bergeron rejected this offer as well. After she had been away from work for seven years, the Department decided to fill Bergeron's position. She filed two grievances and two human rights complaints. The relevant grievance and complaint alleged that Bergeron was discriminated against based on physical disability through failure to accommodate her and by staffing her position. The grievance officer authorized a further five-month period of leave without pay to allow for return-to-work discussions, which Bergeron rejected. When the union failed to refer the grievance to arbitration, the award became final. The Department offered to allow Bergeron to resign, retire, or apply for early retirement, which she rejected. Bergeron was terminated. The human rights complaint was dismissed by the Canadian Human Rights Commission ("Commission") based on an investigator's recommendation. An application for judicial review was dismissed. Bergeron appealed.

The appeal was dismissed. The grievance, which was essentially the same as the human rights complaint, allowed for further discussions which Bergeron declined to pursue. The grievance officer was not biased, and any concerns about the officer's independence could have been resolved through adjudication, which Bergeron declined to pursue. The decision by the Commission was consistent with the requirements set out by the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v. Figliola*, 2012 CLLC ¶230-001. The grievance officer had jurisdiction to determine human rights issues and the ability to grant relief. The issues in the grievance were essentially the same as the human rights complaint, and Bergeron had an opportunity to know the case and to meet it. The Commission provided adequate reasons and the decision was reasonable. There were no grounds to interfere with the Commission's decision on the basis of procedural fairness, as the process was fair, the investigator was neutral, and the reasons were sufficiently thorough.

Bergeron v. Canada (AG), 2015 CLLC ¶230-048

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