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LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Fall 2014

A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

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Employers Cannot Be Forced to Resume Business, Rules Canada's Top Court

Wal-Mart began operating in Jonquiere, Quebec in 2001. The United Food and Commercial Workers, Local 503 ("the Union") became the certified bargaining agent for its employees in 2004. After several months of unsuccessful negotiations, an arbitrator was appointed to establish the first collective agreement between the parties. Just one week later, Wal-Mart announced its intention to close the new store, which it ultimately did on April 29, 2005.

The Union responded with a slew of legal proceedings against Wal-Mart, most of which were resolved in Wal-Mart's favour. However, on June 27, 2014, the Supreme Court of Canada released a decision overturning the Quebec Court of Appeal, and agreeing with the Union's allegation that the store's closure constituted a change in terms and conditions of employment in violation of section 59 of the Quebec *Labour Code* ("the *Code*"). Section 59 provides that from the filing of an application for certification until the execution of a collective agreement, an employer may not change its employees' conditions of employment without the written consent of the Union, unless such change is in the ordinary course of business. This is also known as the "statutory freeze" provision.

Justice LeBel, writing for the majority, began by characterizing the statutory freeze provision as unintended to be punitive of anti-union animus but rather, intended to protect freedom of association and facilitate the development of a labour relations framework for the workplace. He stated that the Union's grievance succeeded because it was able to demonstrate that being employed constitutes a condition of employment, that there was a condition of employment which existed on the day the certification application was made, that this condition was unilaterally changed by the employer, and that the change was made during the prohibited period. At the time of the certification application, there were approximately 200 employees at the workplace. By

closing the store, the employer had rescinded each employment contract, and the store was closed before a collective agreement was executed.

Justice LeBel further described the statutory freeze provision as one that does not reverse the burden of proof, but requires the Union to go further in demonstrating that the change in conditions of employment was not consistent with the employer's ordinary course of business. In this case, the Union successfully proved that the change was not consistent with the employer's past management practices, and was not consistent with the decision a reasonable manager would have made in the same circumstances, given that the establishment was performing very well and meeting its business objectives at that time.

Rendering the Court's controversial decision regarding the appropriate remedy, Justice LeBel posited that since the case began as a labour arbitration grievance pursuant to sections 59 and 100.12 of the *Code* and article 1590 of the *Civil Code of Quebec*, the Court should defer to the arbitrator, who is empowered with broad remedial discretion. Under these provisions, the arbitrator may award reparation in kind (reinstatement) or reparation by equivalence (damages). The Court recognized that there is no possibility of reinstatement, since the employer had gone out of business. Nevertheless, the Court recognized the possibility of an alternate remedy in the form of damages. Accordingly, the issue of quantum of damages will be determined by the arbitrator.

For employers in Canada, this decision provides reassurance that neither arbitrators nor courts will order an employer to resume business operations terminated during the statutory freeze period. However, employers in Canada may nevertheless find the decision troubling in its definitive statement that closing a workplace during the statutory freeze period may constitute a violation of the law, and could be a costly endeavour. For Wal-Mart, the cost of the violation is yet to be seen.

We will keep readers informed of developments regarding the damages award.

Update on *Cruden*: Procedural Duty of Accommodation

The winter edition of EMPLAWYERS' UPDATE informed our readers about the Federal Court decision that determined the *Canadian Human Rights Act* (the "*Act*") does not impose procedural duties on employers in the course of fulfilling the duty of accommodation.

On May 20, 2014, dismissing an appeal by the Canadian Human Rights Commission ("the Commission"), the Federal Court of Appeal agreed that the *Act* does not impose stand-alone procedural duties.

Ms. Cruden was an employee of the Canadian International Development Agency (CIDA, "the Agency") with type 1 diabetes. She applied for a posting in Afghanistan to gain field experience, in order to become a development officer within the Agency. During her second posting in Afghanistan, she experienced a hypoglycemic incident and was returned to Canada. Following this incident, CIDA mandated medical assessments, as well as adherence to newly developed Medical Evaluation Guidelines for Posting, Temporary Duty or Travel to Afghanistan ("the Guidelines"), applicable to all postings in Afghanistan. That Cruden was not posted in Afghanistan due to the application of the medical assessments and the Guidelines was undisputed.

Cruden complained to the Canadian Human Rights Tribunal ("the Tribunal") which determined that while CIDA's practices were discriminatory, it would constitute an undue hardship on the Agency to accommodate Cruden in Afghanistan. However, the Tribunal also ruled that the Agency had not met its procedural duty to accommodate Cruden, and awarded certain monetary and administrative remedies on this basis.

At the Federal Court, the Commission was unsuccessful in arguing that while CIDA had not breached Cruden's substantive rights, procedural duties in the accommodation process constitute a separate source of liability.

On appeal, the Federal Court of Appeal held that the Federal Court was correct in interpreting the *Act* as providing a *bona fide* occupational requirement, and that the undue hardship to the employer was a complete defense to the allegations of discrimination. Accordingly, the Tribunal had not erred in holding that the *Act* had not been violated. Further, the Court held that it was reasonable for the Federal Court to interpret the *Act* as requiring the Tribunal to dismiss the complaint as soon as it found that it would be an undue hardship on the employer to accommodate the employee. The Court concluded that there is no statutory nor jurisprudential support for a separate, procedural duty to accommodate.

In Ontario, the Human Rights Tribunal and reviewing courts have repeatedly found that, even where undue hardship has been substantively established, damages may be awarded if a separate, procedural duty of accommodation has been breached. For example, procedural deficiencies such as failure to conduct a thorough investigation, or a detailed search of alternative suitable employment have given rise to awards of damages in Ontario. Accordingly, this issue may be treated differently in other jurisdictions. Nevertheless, for federal employers, this decision maintains that there is no right to procedural accommodation independent of the substantive rights provided for under the *Act*.

Mental Stress Legislation Deemed Unconstitutional

In a recent decision, the Workplace Safety and Insurance Appeals Tribunal determined that the *Workplace Safety and Insurance Act, 1997* and Workplace Safety and Insurance Board (WSIB) policy eligibility requirement of "sudden traumatic onset" of mental stress is in violation of the *Canadian Charter of Rights and Freedoms*.

This controversial ruling arose from an Appellant nurse's account of harassment and bullying which she suffered at the hands of a fellow employee for over twelve years. She also explained being re-victimized when she was effectively demoted after reporting the incidents to a team lead. As a result, the nurse explained that she was unable to continue working and was eventually diagnosed with an adjustment disorder with mixed features of anxiety and depression.

The Appellant filed a workers' compensation claim for mental stress. The claim was denied on the basis that she did not have "an acute reaction to a sudden and unexpected traumatic event" as required by sections 13(4) and (5) of the *Act* and the WSIB's *Operational Policy Manual* on Traumatic Mental Stress.

On appeal before the Tribunal, the Tribunal identified the issue to be decided as whether the *Act* and the Policy create a distinction based upon an enumerated or analogous ground in contravention of the equality guarantee in section 15 of the *Charter*.

Ultimately, the Tribunal granted the Appellant nurse entitlement for mental stress after finding that the requirements, instituted in 1998, treated applicants with psychological claims differently from applicants with physical claims in an unjustifiable contravention of the right to be treated equally.

The Tribunal's decision addressed in great detail the purpose and effect of the sections dealing with mental stress and found a few distinctions. First, there was a distinction based on work-related gradual onset mental disability in comparison with work-related gradual onset physical disability. Secondly, there was a distinction between claimants for mental stress who had not experienced a "sudden traumatic event" in comparison with those who had experienced a "sudden traumatic event" and/or had experienced physical injuries.

The effect of these distinctions, the Tribunal concluded, was that workers who had not experienced a "sudden traumatic event" were treated differently and discriminatorily. Further, workers with a mental disability were prevented from accessing benefits through disablement which are available to workers with physical disability.

In rejecting all arguments made in defence of the *Act* and the Policy, the Tribunal held that the lack of evidence regarding the work-relatedness of mental disorders and the lack of clinical methods for assessing the work-relatedness of chronic mental stress claims is not distinguishable from physical injury claims to the extent that it warrants treatment which is different from physical injuries and diseases. Furthermore, this distinction creates a disadvantage by perpetuating prejudice or stereotypes.

The Tribunal applied section 1 of the *Charter of Rights and Freedoms* to determine whether, regardless of the *Act* and Policy's violation of section 15 of the *Charter*, the violation may be demonstrably justified in a free and democratic society. Once again, the Tribunal found in the Appellant's favour, concluding that provisions dealing with mental stress do not represent a reasonable or equitable approach to the identified purpose of establishing the work-relatedness of mental disorders.

As a remedy, the Tribunal allowed the appeal and declined to apply the sections of the *Act* and the Policy which deal with mental stress.

The Ministry of the Attorney General of Ontario, who participated in the hearing, has not yet announced whether it will judicially review the decision.

Although this decision does not have general application to all psychological injury claims, employers need to be aware of this ruling, as it may result in a greater influx of mental disability and addiction claims by virtue of the Tribunal's lowering of the threshold for eligibility. Many provincial jurisdictions have similar limitations on psychological injury claims, and similar applications will likely be brought in those jurisdictions.

Overtime Class Action Settlement Approved

In previous editions of EMPLawyers' Update, we chronicled the developments of multi-million dollar class actions for withheld or underpaid overtime hours filed against various national banks. For the Bank of Nova Scotia, this saga may be nearing its end, as on August 12, 2014 Justice Belobaba of the Ontario Superior Court of Justice approved a settlement proposed by the parties.

This all began in December 2007, when a class action lawsuit was commenced against the Bank on behalf of certain full-time retail branch employees. The lawsuit claimed that the Bank had failed to pay overtime compensation to entitled employees, resulting in financial damages in the form of lost overtime wages.

The lawsuit was certified as a class proceeding in 2010, and the certification was upheld on appeal by the Ontario Divisional Court and the Court of Appeal, with leave to the Supreme Court of Canada being denied in 2013.

In Justice Belobaba's written decision, he approved the settlement which includes the following terms and conditions:

- employees claiming unpaid overtime must submit their claim to the Bank by October 15, 2014;
- employees may claim unpaid overtime for the period of August 12, 2014 retroactive nine or thirteen years, depending on the province in which the employee worked;
- the Bank will review the claim, decide to pay the claim or reject it, and will provide reasons for doing so;
- employees who are dissatisfied with the Bank's decision on a claim may appeal to an independent arbitrator as part of a streamlined arbitration process;
- the Bank will ensure that no employees are subject to any reprisal; and,
- the Bank's managers and supervisors will not contact claimants nor discuss the claim.

The Court held that the proposed settlement is "fair and reasonable and in the best interests of the class".

Quebec Employer Not Permitted to Waive Employee Notice of Resignation

The Supreme Court of Canada has ruled that an employer who receives notice of resignation from an employee cannot terminate the contract of employment before the notice period expires without providing notice of termination or pay in lieu thereof.

In a prior edition of EMPLAWYERS' UPDATE, we informed our readers of the Quebec Court of Appeal's decision in *Quebec (Commission des normes du travail) v. Asphalte Desjardins Inc.* This is the case of Daniel Guay, who on February 15, 2008, advised his employer, Asphalte Desjardins Inc., that he would be leaving its employ and moving to a competitor on March 7, 2008. Failing to dissuade him from resigning, the company terminated his employment on February 19, 2008.

The Quebec Labour Standards Commission successfully brought an action, on Mr. Guay's behalf, claiming three weeks' pay in lieu of notice of termination and vacation pay, pursuant to Quebec's *An Act Respecting Labour Standards* (the "*Act*"), which corresponded to his notice of resignation. Shortly thereafter, the decision was overturned by the Quebec Court of Appeal.

On appeal to the Supreme Court of Canada, the Court allowed the appeal, restoring the prevailing jurisprudence which generally requires an employer to provide notice of termination when ending the employment relationship in advance of an employee's declared resignation date, pursuant to section 82 of the *Act*. Also pursuant to the *Civil Code of Québec* ("the *Code*"), both the employer and employee must provide notice of termination. The Court's decision was founded on the interplay between the *Code* and the *Act*, and the harmonious interpretation of both laws.

Asphalte Desjardins had argued that its termination of the employment relationship in advance of the resignation date was simply a renunciation of its right to notice of resignation. Justice Wagner, writing for the majority, rejected this argument on the basis that although, renunciation of contractual rights by one party relieves the other party from performance of its obligations, it would be unequivocally "inappropriate" and an "unacceptable fiction" to apply this construct in the present context.

The Court further noted that while the *Code* does not provide an employer with the right to obtain pay in lieu instead of working notice of resignation, in the manner that an employee may, it also does not provide the employer with the right to waive or renounce notice of resignation. If the employer no longer wishes to have the employee in the workplace subsequent to the employee's provision of notice of resignation, the employer must provide pay in lieu of notice.

In addition, however, the Court noted that the provisions of the *Act* and the *Code* would not apply to instances where termination of contract flows from an agreement between the parties.

Employers in Quebec should take note that the Supreme Court of Canada has ruled that an employer is prohibited from terminating a departing employee during the notice of resignation period without providing notice of termination or pay in lieu thereof. In other words, an employer who terminates an existing employment contract is liable for notice of termination, regardless of whether the employee has announced a resignation date. The same law applies in Ontario.