BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS'™ UPDATE

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A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

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Amendments to the *Canada Labour Code*

In December 2012, amendments to the *Canada Labour Code* (the *Code*) were enacted in the areas of holiday pay, wage-related complaints, the period covered by payment orders, and review mechanisms.

These amendments are not industry-specific. Rather, they pertain to all federally-regulated employers. The most substantive amendments are presented in detail below.

1) Holiday Pay

Bill C-45 adds a defined time limit for paying vacation pay to an employee whose employment has terminated. Employers must now pay accrued vacation pay within 30 days of the employee's termination.

Bill C-45 also simplifies the calculation of holiday pay. "Holiday pay" is now defined by a detailed formula: 1/20th of the regular wages earned in the four weeks prior to the holiday. For employees who earn commissions and have completed at least 12 weeks of employment, holiday pay is defined as 1/60th of the regular wages earned in the 12 weeks before the holiday. The previous requirement that employees work at least 15 days of the previous 30 in order to be entitled to holiday pay has been eliminated. However, the *Code* now provides for certain exclusions from entitlement to holiday pay, including employees who do not yet have 30 days of service, and employees employed in a continuous operation.

2) Complaints Under Part III

Bill C-45 sets out new timelines for non-unionized employees to make certain complaints under Part III of the *Code*, and clarifies the circumstances in which an inspector may suspend or reject such complaints.

Employees who remain employed by the employer must now make wage-related complaints within six (6) months from the last day on which the employer was required to pay those wages (claims of unjust dismissal, however, continue

to be governed by a 90-day time limit). All other complaints must be made within six (6) months of the day on which the subject-matter of the complaint arose. These new time limits can be extended by the Minister or inspector, on application of a party.

The *Code* also provides a list of circumstances under which an inspector may suspend or reject a complaint. A complaint may be suspended where the inspector is satisfied that the employee must take further, specific measures before the complaint may be dealt with, or where the inspector finds that any one of these circumstances exist:

- the complaint is not within her/his jurisdiction;
- the complaint is frivolous, vexatious or made in bad faith;
- the complaint has been settled;
- there are other means available to the employee to resolve the subject-matter of the complaint;
- the subject-matter of the complaint has been adequately dealt with;
- in a complaint other than a complaint of unpaid wages, there is insufficient evidence to substantiate the complaint; or
- a collective agreement covers the subject-matter of the complaint and provides a third party dispute resolution process.

A decision to reject a complaint is reviewable by written request to the Minister, and the Minister's determination is final and binding.

3) Payment Order Periods

Bill C-45 limits the period that may be covered by a payment order. In the case of a successful complaint, the amount of unpaid wages recoverable is limited to 12 months in arrears, and the amount of vacation pay recoverable is limited to 24 months in arrears.

4) Review Mechanism

Bill C-45 amends the *Code* to provide for a method by which payment orders or orders rejecting a complaint as unfounded may be reviewed by the Minister. The Minister's ruling is now subject to a right of appeal, as provided for in other unchanged sections of the *Code*.

This set of amendments also provides guidelines for procedural matters such as service of documents, content of appeal documents, and time limits for appeal.

Legislative Update: Leaves to Help Families

On March 5th, 2013, the Ontario government proposed an amendment to the *Employment Standards Act, 2000*, ("*ESA*"), entitled the *Employment Standards Amendment Act (Leaves to Help Families), 2013* to create three job-protected leaves:

- Family Caregiver Leave: up to eight weeks of unpaid leave for employees to provide care and support to a family member with a serious medical condition.
- Critically Ill Child Care Leave: up to 37 weeks of unpaid leave to provide care to a critically ill child.
- Crime-Related Child Death and Disappearance Leave: up to 52 weeks of unpaid leave for parents of a missing child and up to 104 weeks of unpaid leave for parents of a child that has died as a result of a crime.

These leaves would be separate from those already available under the *ESA*, including family medical leave.

Bird Richard will keep readers apprised of the status of this proposed amendment.

Proposed Regulation Regarding Mandatory Health and Safety Training for All Workers and Supervisors

The Ministry of Labour has proposed the introduction of new regulatory requirements that would require employers to ensure that all workers and supervisors complete mandatory occupational health and safety awareness training programs. The proposed requirements would apply to everyone who meets the current definitions of "worker" and "supervisor" under the *Occupational Health and Safety Act*.

Should the proposed regulation take effect, employers will be able to demonstrate compliance by having their workers and supervisors complete either those programs that are being developed by the Ministry of Labour, or existing or alternate programs that meet the minimum regulatory requirements.

This regulation is intended to be filed on July 1st, 2013 and will require employees to complete the training by January 1st, 2014.

Human Rights Protections Against Hate Speech Limited by Freedom of Expression

William Whatcott distributed flyers in Saskatoon, Saskatchewan, two of which were entitled "Keep Homosexuality out of Saskatoon's Public Schools!" and "Sodomites in our Public Schools". Complaints were lodged with the Saskatchewan Human Rights Commission claiming that these flyers promoted hatred against individuals based on their sexual orientation in contravention of section 14 of the *Saskatchewan Human Rights Code* ("*the Code*").

At issue was whether provincial human rights legislation, which prohibits any publication "that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground", unjustifiably infringes upon guaranteed freedoms of expression and religion, under the *Canadian Charter of Rights and Freedoms*.

The Human Rights Tribunal and Court of Queen's Bench found that the flyers violated section 14 of the *Code*. While Saskatchewan's Court of Appeal agreed that section 14 of the *Code* was constitutional, it stated that the flyers did not contravene it.

In a unanimous decision, released in February 2013, the Supreme Court of Canada proclaimed that section 14 is indeed a justifiable limitation on freedom of expression and freedom of religion. Additionally, the Court did not find the part of section 14 that prohibits any representation "that exposes or tends to expose to hatred" to be overbroad in protecting the intended group of individuals from hate speech. However, the Court struck out the part of the section that prohibits any statement which "ridicules, belittles or otherwise affronts the dignity of" individuals, stating that these did not constitute a justifiable limitation on free expression.

The Supreme Court of Canada went on to apply the tests to the content of the flyers. It found that the flyers constitute hate speech, and that any reasonable person, aware of the relevant context and circumstances, would find that these messages would expose or be likely to expose persons of a particular sexual orientation to detestation and vilification.

The decision stands for the principle that there must be a balancing between the freedom of expression and freedom to be free from discrimination. The SCC recognized that the limitations violated the freedom of expression and then focused on the section 1 *Charter* test. They concluded that the purpose of section 14 to restrict "hate" related speech was acceptable, but that the additional limitation of "belittle etc." was not.

When a Swimming Pool is Just a Swimming Pool

As a result of *Blue Mountain Resorts Ltd. v. Bok*, injuries sustained by guests while on an employer's premises do not turn every inch of those premises into a "worksite" for the purposes of the *Occupational Health and Safety Act* ("the *Act*").

Blue Mountain Resorts Limited owns and operates an all-season resort and recreational facility offering 36 downhill ski runs and other recreational facilities, including mountain biking trails, a golf course, and an indoor swimming pool. On December 24th, 2007 a guest drowned while swimming in an unattended indoor pool. Blue Mountain did not report this death to the Ministry of Labour. It took the view that employers are not required to report the deaths or critical injuries of guests. However, a Ministry of Labour inspector took the opposite position and issued several orders to that effect.

Blue Mountain sought to have the orders quashed at the Ontario Labour Relations Board. The Board upheld the orders, however, agreeing with the inspector that the swimming pool is part of the worksite, as workers are invariably in the pool at some point for its maintenance. Blue Mountain applied to the Divisional Court for judicial review of the Board's ruling. The Divisional Court upheld the orders on the same basis.

At the Ontario Court of Appeal, Blue Mountain was successful. The Court decided that in order to engage section 51(1) of the *Act* there must be a reasonable nexus between the hazard giving rise to injury and the realistic risk to worker safety at the workplace. This nexus requires a physical hazard with the potential to harm workers and non-workers alike. The fact that an accident has occurred at a place where a worker may be at some point in time is insufficient to trigger the operation of section 51(1).

While the Court affirmed that it will continue to give remedial legislation such as the Act broad application, in this situation it would have been overly broad to engage section 51(1) when there was no reasonable connection between what actually happened and a risk to worker safety at the site. To engage the Act where "guest injuries" occur would turn the entirety of Ontario into a workplace and require every employer to report every death or critical injury sustained by anyone in any capacity, whatever the cause.

This ruling clarifies the application of section 51(1) of the *Act*, and serves as a reminder to employers that they must report deaths and critical injuries, but only if they are caused by a hazard that is inherent in the workplace and is potentially harmful to workers.

Report on Human Rights: Pinto Report Finds Fully Functioning Facilities

Early in 2008, the Ontario government made substantial changes to the human rights system. This new and improved system was designed to resolve disputes more quickly and to provide more assistance to those making discrimination claims, amongst other improvements.

Andrew Pinto, a human rights and employment lawyer, was appointed by the Attorney General to conduct an external review of the new system. Mr. Pinto's 233-page report was released late last year, and sets out his assessment of and recommendations regarding the new system.

His findings are summarized as follows:

The Tribunal

Mr. Pinto found that the redesigned Human Rights Tribunal initiates and moves claims along more swiftly, and greater transparency is provided through written decisions. Most importantly, the Tribunal gives the public the appearance of impartiality: remedies are awarded where merited, and the Divisional Court has had few occasions to overturn the Tribunal's decisions.

However, the Tribunal could improve its performance by screening unmeritorious cases out of the process faster and earlier than it does currently. Mr. Pinto suggests the following specific improvements, among others: simplification of Tribunal forms, increased resolution rates via mediation, increased general damages to reflect the gravity of discrimination, and the publication of improved protocols and practice directions.

The Human Rights Legal Support Centre

The Centre has improved access to the human rights process. In cases where the Centre provides full representation, it has been very successful at mediation, at hearing, and in the remedies obtained. However, this benefit was stifled by the Centre's limited capacity to serve its many clients. Mr. Pinto recommends that the Ministry of the Attorney General provide more resources, both legal and administrative, in order to allow the Centre to represent more claimants, particularly in legal clinics outside of Toronto.

The Human Rights Commission

Mr. Pinto had mixed reviews of the Commission's performance. While he found the Commission successful in respect of its new mandate of research, monitoring, policy development, education and training, it is failing to maintain a connection with the private sector, to remain accessible to the general public, and to litigate the more complicated systematic discrimination cases which individual complainants often have difficulty pursuing.

Recommendations to tackle these shortcomings include taking on cases relevant to the private sector such as hiring and retention, re-establishing a public access telephone line, established and, significantly, establishing a Human Rights Compliance Unit to offer proactive advice to respondents. This would allow employers and others to maintain compliance with human rights legislation and avoid human rights claims.

System-Wide Issues

Mr. Pinto identified a lack of coordination between the above three agencies, which makes it difficult to identify gaps and redundancies.

The Pinto report encourages employers to become familiar with the three branches of the human rights system, in order to make it easier to identify the ways in which the system can become a resource for your organization. For instance, one of the most popular resources available to employers is an assessment of their internal workplace human rights policies to confirm compliance with the *Human Rights Code*. Further, should Mr. Pinto's recommendation regarding the Compliance Unit be implemented, this could be a very useful prevention tool for employers.