BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

Bird Richard
130 Albert Street, Suite 508
Ottawa, Ontario K1P 5G4
T 613.238.3772
F 613.238.5955
www.LawyersForEmployers.ca

Working for Workers Five Act

Bill 190, *Working for Workers Five Act, 2024* ("the *Act*") was announced by the Ontario government on May 6, 2024. The *Act* proposes numerous changes to the *Employment Standards Act* ("*ESA*") that are aimed at improving the workplace, including new health measures, removing barriers to employment, supporting women at work, and increasing fairness for job seekers. While the *Act* promises a better work environment to employees, it will be quite onerous for employers. Most notably, it will double the maximum fine for employers who violate the *ESA*, remove an employers' right to ask for sick notes from medical professionals, and alter job posting requirements. If the *Act* receives Royal Assent, some of the changes to come are detailed as follows:

Keeping Workers Healthy and Safe

Employers will be prohibited from requesting a sick note from medical professionals when workers use their three days of statutory sick leave under the *ESA*. They will be able to request other forms of evidence that are not from medical professionals, and are reasonable in the circumstances, such as signed self-attestations.

Remove Barriers to Employment

Registration for internationally trained workers will be streamlined. Where typical registration documents are not available for reasons beyond the applicant's control, such as war or disaster, the employer must accept alternative forms of documentation.

Support Women at Work

Employers will be required to maintain a record of washroom sanitation to ensure accountability for cleanliness. The definition of workplace harassment will also be expanded to include virtual harassment, as well as virtual sexual harassment.

Increase Fairness for Jobseekers and Employees

On October 1, 2024, minimum wage will increase by 3.9%, from $16.55 to $17.20. This is particularly impactful in

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industries where the division between employee and supervisor is an increased hourly rate. In addition to higher rates for entry-level staff, it is likely that an increased minimum wage will prompt supervisors in these industries to ask for a raise to maintain the hierarchy that is represented by differences in pay. It also may deter entry-level staff from seeking promotion, as they will already be making a similar pay as their supervisors.

Public job listings will require specific indication of whether the position is currently vacant, and the employer will be required to respond to all candidates who are interviewed for the position.

The *Act* will also double the fine for violating the *ESA*, going up from $50,000 to $100,000.

The *Act* has not yet received Royal Assent, so it may be modified before it becomes law. To avoid the risk of a hefty fine, employers are encouraged to consult a lawyer to ensure compliance with the upcoming changes.

EI Denied for Breaching Vaccination Policy

Even after most COVID restrictions have been lifted, a recent decision upheld the right of employers to mandate health standards in the workplace. In May 2024, *Robin Francis v. Canada (AG)* confirmed that workers who fail to comply with workplace vaccination policies are guilty of wilful misconduct, and thereby disqualified from receiving Employment Insurance.

Dr. Robin Francis's employer implemented a mandatory COVID vaccine policy in September 2021. Dr. Francis applied for an exemption from the policy based on creed, which was denied. After failing to become vaccinated by the required date, Dr. Francis was terminated by his employer.

Dr. Francis then sought Employment Insurance. His application was denied by the Canada Employment Insurance Commission because his breach of his employer's vaccine policy amounted to termination for wilful misconduct. Dr. Francis appealed the decision to the Tribunal's Appeal Division, who held the benefits had been properly denied. He then applied for judicial review at the Federal Court of Appeal.

After failing on judicial review, Dr. Fraser unsuccessfully applied for leave to the Supreme Court of Canada.

This case stands for the principle that failing to comply with a mandatory vaccine policy is sufficient to establish wilful misconduct in the workplace. The ruling may increase employee's adherence to vaccine policies, as those who are terminated for non-compliance will no longer be able to rely on receiving Employment Insurance to supplement their lost income.

Anti Replacement Worker Legislation

Bill 5-58, *An Act to Amend the Canada Labour Code and the Canada Industrial Relations Board Regulations* ("the Bill") was recently passed through the House of Commons and is awaiting Royal Assent. It proposes changes to the *Canada Labour Code* ("*CLC*") that will further prohibit the use of temporary replacement workers in federally-regulated workplaces during legal strikes and lock outs. Its aim is to improve labour relations, protect the right to strike, and expedite the bargaining process.

Despite the Government's stated aims, legislation striking down the use of temporary replacement workers poses a real risk to the Canadian economy. Not all employers will concede in the face of a total-work stoppage. In industries such as transportation and communication, a lengthy strike without replacement workers has the potential to severely disrupt services that are vital to the economy and our daily lives.

The current *CLC* prohibits employers from using temporary replacement workers during legal strikes or lock outs for the purpose of undermining a union's representation capacity. The Bill strengthens this prohibition, stipulating that federally-regulated employers will be prohibited from using any employee in the bargaining unit, or workers of another employer, to temporarily perform the duties of employees who are on legal strike or lock out. This includes managers or contractors, unless they were doing similar work before notice to bargain was given. The Bill provides exceptions where the use of replacement workers is necessary to secure the health and safety of any person, the employer's property, or the environment. Breaching these provisions may lead to conviction of a summary offence and a fine of up to $100,000 per day.

Bill C-58 goes much further than Provincial legislation that prohibit the use of temporary replacement workers. For example, the British Columbia *Labour Relations Code* does not stop members of the bargaining unit from crossing the picket line.

Continuing to work in the face of a strike is a common way that employees can meaningfully express their disagreement

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with the union. The Minister of Justice has expressed that, although he supports the Bill, depriving employees of that opportunity could possibly limit their s. 2(b) Charter right to freedom of thought, belief, opinion and expression.

The Bill leverages the threat of total work stoppage to motivate softer bargaining from the employer. It gives more power to unions at the bargaining table, and limits the employee's ability to choose to work. It is uncertain that in practice the Bill will lower strike and lock-out rates. However, it is clear that when they do occur, a lack of temporary replacement workers will magnify the strike or lock-outs' impact on Canadian society.

Evidence Required to Prove Religious Discrimination

A string of recent decisions released by the Alberta Human Rights Tribunal ("the Tribunal") confirmed the evidence required to support claims for discrimination under the *Alberta Human Rights Act* ("the *Act*"). More stringent, clearer standards will allow employers to navigate requests for accommodation with less fear of grievances or claims arising under the *Act*. Although the decisions are focused on exemption from vaccination policies, they offer guidance to employers who are responding to requests for religious exemption from any policy in the workplace.

All four cases concerned an employee's denied request for an exemption from a mandatory workplace vaccination policy on the grounds of religious belief. Each of the employees claimed discrimination under the *Act*. The evidence they brought to support their claims was as follows:

1. In *Haahr v. Canadian Natural Resources Ltd.,* 2024 AHRC 26, the claimant brought a personal statement explaining their belief.
2. In *Sheppard v. Canadian Natural Resources Ltd.,* 2024 AHRC 37, the claimant provided a letter from their Reverend as evidence.
3. In *Scott v. Canadian Natural Resources Ltd.*, 2024 AHRC 42, the claimant brought a letter from their lawyer supporting their belief.
4. In *Ducharme v. Canadian Natural Resources Ltd.,* 2024 AHRC 44, the claimant provided a letter from Christ's Forgiveness Ministries and a personal statement.

The outcome of these cases was guided by the Tribunal's previous decision in *Pelletier v. 1226309 Alberta Ltd. o/a Community Natural Foods,* 2021 AHRC 192. Pelletier stands for the principle that to assert discrimination, it is not sufficient to sincerely hold a religious belief. The claimant must bring sufficient evidence to establish on an objective basis that the belief is a tenet of religious faith, and that it is a fundamental part of expressing that faith.

None of the evidence brought by the claimants in these cases was sufficient. In each claim, the Tribunal determined the failure to comply with the vaccine mandate was based on personal conviction rather than an objective tenet of faith.

The quartet of decisions establish that complaints of discrimination for religious faith in Alberta require evidence that objectively demonstrates the item at issue is prohibited by the complainant's religion. It is now clear that personal statements and notes from religious authorities or a lawyer are insufficient to ground a case for discrimination under the *Act*. This standard will help employers gauge which requests for exemption they ought to accept, and which can be rejected without entering the realm of discrimination. Should this issue arise outside of Alberta, these decisions may influence the outcome in other Provinces.

School Boards Bound by Charter

The Supreme Court of Canada ("SCC") recently decided in *York Region District School Board v. Elementary Teachers Federation of Ontario* that the *Canadian Charter of Rights and Freedoms* ("*Charter*") applies to Ontario public school boards. Specifically, the application of the s. 8 right to be free from unreasonable search and seizure in the workplace. The decisions will inform future judgments regarding reasonable expectations of privacy in non-criminal contexts like the workplace.

Background

In 2014, Ms. Shen and Ms. Rai ("the grievors") were hired by York Region District School Board ("the Board"). The grievors began a shared Google Doc to log concerns about another teacher. The shared Google Doc was attached to their personal email accounts and saved to 'the cloud', but often accessed via their work laptops.

When the principal became aware of the shared Google Doc, an unsuccessful IT search was conducted to uncover it. Escalating his search, the principal entered Ms. Shen's classroom and activated her open laptop by touching its mousepad. The laptop opened to the shared Google Doc, which the principal photographed and forwarded to the Board. These photographs formed the basis of written reprimands given to the grievors by the Board.

In 2018, the matter went to arbitration and the grievors' reasonable expectations of privacy was found to be outweighed by the Board's interest in managing the workplace. Therefore, the Board did not unlawfully violate the grievor's privacy.

One year later, the Divisional Court upheld the arbitrator's conclusion. However, in 2022, the Ontario Court of Appeal overturned the Divisional Court's ruling and quashed the arbitrator's decision for failing to consider the grievors' s. 8 Charter rights.

Supreme Court of Canada

The SCC concluded that the arbitrator failed to properly consider the grievor's s.8 right to be free from search and seizure in their decision. There must be a clear acknowledgement and analysis of the *Charter* right. The arbitrator merely balanced the interests of managerial control with employee privacy. For this reason the arbitrator's decision was incorrect and was quashed by the SCC.

This case specifically concerned the application of s. 8 in Ontario school boards. However, the decision will impact the way that all constitutional issues are analyzed in the context of Canadian schools. Judges and arbitrators are now required to apply rigorous constitutional analysis where *Charter* questions arise in the context of public school. Even where there is consent, when dealing with an Ontario school board, the arbitrator has no choice but to apply the relevant *Charter* test.

Charter standards are highly contextual and complex. Specifically in the context of s. 8, the court will consider both subjective expectation of privacy and the objective reasonableness of the belief. Employers in the education system are encouraged to consult their lawyer to ensure compliance with *Charter* standards.