Cassels

2023: The Year in Review in Employment Law

Maria Constantine, Sophie Teversham

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2023 marked another year of significant change for employers in Canada. Several provinces introduced new legislative regimes, including British Columbia's new pay transparency legislation and Ontario's new licensing regime for temporary help agencies and recruiters. In addition, our courts ruled on a range of issues including exceptional notice periods, COVID-19 vaccination requirements, and fixed-term contracts, and Alberta was the first province in Canada to recognize a new tort of harassment.

In this article, we have highlighted some of the most notable developments in employment, labour, and immigration law in Canada over the past year.

1. STATUTORY CHANGES

Ontario

Bill 79, the *Working for Workers Act, 2023*, came into force on October 26, 2023.

This new legislation introduced several changes to Ontario's *Employment Standards Act, 2000* (ESA) and other employment-related legislation in Ontario. Of particular significance, Bill 79 expanded the definition of "establishment" under the ESA from a location at which an employer carries on business to now include an employee's private residence if the employee works from that residence and does not perform work at any other location where the employer carries on business. This amendment means that fully remote, full-time employees working in Ontario will need to be included in the 50-employee count when evaluating whether an event constitutes a mass termination under the ESA and will be eligible for the same enhanced period of mass termination notice or pay in lieu as employees who work in-office or on a hybrid basis.

Bill 79 also amended the ESA to require temporary help agencies and recruiters to hold a licence to operate. Clients of such agencies will be prohibited from knowingly engaging or using the services of a temporary help agency or recruiter unless they hold a licence. Although certain aspects of the licensing regime have already come into force, the deadline by which recruiters and temporary help agencies must have a licence to operate was recently extended to July 1, 2024. Following this deadline, temporary help agencies, recruiters, and their clients could face serious financial penalties for non-compliance.

For more information on this new licensing regime, please see our previous commentary available here and here.

On November 14, 2023, the Ontario Government introduced Bill 149, *Working for Workers Four Act, 2023*, which, if passed, will introduce important changes to the ESA that will impact how Ontario employers approach the recruitment and hiring processes. These changes include:

- prohibiting employers from including a requirement for Canadian work experience in job postings or application forms;
- requiring employers to disclose expected compensation or range of compensation in job postings; and
- requiring employers to disclose if they use artificial intelligence in the hiring process.

For more information on the *Working for Workers Four Act, 2023*, please see our previous articles available here and here.

British Columbia

The *Pay Transparency Act* officially became law in BC on May 11, 2023. Some key highlights include prohibitions on employers asking job applicants about their pay history and mandating that all BC employers include the expected pay or pay range in publicly advertised job postings.

For a detailed discussion on BC's new *Pay Transparency Act* and the steps employers in Canada need to take to ensure compliance with this legislation, please watch parts one and two of our Pay Transparency webinar. Our previous commentary on BC's new *Pay Transparency Act* is also available here.

Federal Legislative Changes

Effective July 9, 2023, the *Canada Labour Code* (the Code) was amended to require that federally regulated employers:

- reimburse employees for reasonable work-related expenses within 30 days from the date the employee submits an expense for reimbursement;
- provide employees with information respecting the rights of employers and employees under Part III of the Code and post them in the workplace; and
- provide a "written employment statement" to each employee that includes a summary of their specific employment information.

Federally regulated employers must also provide clean and hygienic menstrual products in each toilet room at the workplace (regardless of marked gender), or another private location if more feasible, at no cost to employees, and ensure that a covered container for the disposal of menstrual products is available in each toilet compartment.

For additional details regarding these new requirements for federally regulated employers, please refer to our prior article available here.

In addition, Bill S-211, *Fighting Against Forced Labour and Child Labour in Supply Chains* (the Act), will come into force on January 1, 2024. The Act is focused on preventing and addressing the use of modern slavery within government and private-sector entities' operations and supply chains. Specific government bodies and certain private-sector entities will need to submit an annual report to the Minister of Public Safety and Emergency Preparedness by May 31 of each year. The Annual Report must outline the steps the entity has taken to prevent and reduce the risk that forced labour or child labour is used in its operations and supply chains. Impacted entities will be required to provide training to employees on forced labour and child labour, and report on such training in their Annual Report.

These new requirements will apply to private-sector corporations, trusts, partnerships, and other unincorporated organizations that produce, sell, or distribute goods in Canada or elsewhere, or import foreign goods into Canada, and that:

- are listed on a stock exchange in Canada;
- have a place of business in Canada, do business in Canada, or have assets in Canada and that, based on their consolidated financial statements, meet **at least two** of the following conditions **for at least one of its two most recent financial years**:
  1. have at least $20 million in assets;
  2. have generated at least $40 million in revenue;
  3. employ an average of at least 250 employees; or
- are otherwise prescribed by regulations.

Non-compliance with the Act could result in criminal charges and fines up to $250,000. Notably, the Act creates personal liability for directors and officers, among others, who may be involved in an offence under the Act.

2. CASE LAW UPDATES

Exceptional Notice Periods

This year, there were several cases in which our courts awarded long-serving employees damages based on notice periods in excess of 24 months.

In *Milwid v. IBM Canada Ltd*.[1] the Ontario Court of Appeal upheld a 27-month notice period awarded to a 62-year-old employee who had worked for IBM for 38 years in a specialized position. There were two exceptional circumstances that the court pointed to in supporting such a lengthy notice period: (1) the

employee's skills were almost exclusively related to IBM's products and therefore not transferable, and (2) the employee was dismissed in May 2020, at the height of a global pandemic.

Further, in *Lynch v. Avaya Canada Corporation*,[2] the Ontario Court of Appeal upheld a 30-month notice period for an employee who had also worked 38 years for their employer. The employee was a professional engineer who was nearly 64 years old at the time of his termination in November 2020. The Court of Appeal similarly relied on the employee's specialized skill set, the quality of the employee's work, and the absence of comparable employment in the geographic area as support for the exceptional notice period.

For more information on these decisions, please see our previous commentary available here and here.

Alberta Introduces New Tort of Harassment

Alberta is the first Canadian province to recognize the common law tort of harassment. In *Alberta Health Services v. Johnston*,[3] the Alberta Court of King's Bench awarded the plaintiffs a total of $650,000 in damages, $100,000 of which were for harassment alone. While Ontario and other Canadian provinces have thus far declined to recognize harassment as an independent tort, this decision may pave the way for other Canadian jurisdictions to follow suit.

For a more detailed discussion of the case, please see our prior article available here.

Early Termination of Fixed-Term Independent Contractor Agreements

In *Monterosso v. Metro Freightliner Hamilton Inc.*,[4] the Ontario Court of Appeal weighed in on the question of whether independent contractors engaged pursuant to a fixed-term contract have a duty to mitigate their damages in the event of early termination of their contract. The court confirmed that, absent a contractual term to the contrary, fixed-term independent contractors do have a duty to mitigate their damages in the event of early termination. A key part of the reasoning in this case was the fact that the independent contractor was not in an "employee-like" relationship with the company that had terminated his engagement. Whereas properly classified independent contractors will be subject to the duty to mitigate in these circumstances, dependent contractors, and other workers in an "employee-like" relationship with their clients may not be subject to such duty.

For more information on this decision, please see our previous case comment available here.

COVID-19 Vaccination

In February 2023, the Ontario Superior Court of Justice released the first judicial decision finding that a non-unionized employee's refusal to get vaccinated amounted to frustration of the employment contract. In *Croke v. VuPoint Systems Ltd.*,[5] the court noted that to reach a finding of frustration, there must be a

supervening event, unforeseen by the parties and through no fault of their own, which renders performance of the contract impossible. In this case, the employer's vaccination policy stemmed from the vaccination mandate of a third-party, Bell ExpressVu (Bell), to which the employer provided services. Bell required that all employees of its subcontractors performing installation services be vaccinated against COVID-19. The court concluded that this external vaccination mandate created the unforeseen, supervening event necessary to support a finding of frustration. The circumstances in *Croke* were unusual in that the employer was, at that time, only providing services to Bell, so there was no alternative work it could have assigned to the employee that would not have required vaccination. It remains to be determined whether an employment agreement will be frustrated where the employer has control over whether to implement or enforce a vaccination policy or has other work available to the employee that would not require them to be vaccinated.

Our previous Insight on the *Croke* decision is available here.

3. IMMIGRATION LAW UPDATE

New Public Policies

The Government of Canada has introduced new immigration policies and extended certain others. Employers should be aware of the following:

- The Public Policy to continue to facilitate access to permanent resident status for out-of-status construction workers in the Greater Toronto Area remains in effect until January 2, 2024.
- The temporary waiver on the 20-hour per week limit on the number of hours an international student is allowed to work off-campus during regular academic sessions was recently extended until April 30, 2024. Unless a further extension is announced, the regular 20-hour limit will apply as of May 1, 2024.

New Compliance Requirements

Amendments to regulations under the *Immigration and Refugee Protection Act* add compliance responsibilities for employers of foreign workers under both the Temporary Foreign Worker Program and the International Mobility Program.

These amendments include: requiring employment agreements for foreign workers to contain terms and conditions of employment as outlined in the approved Labour Market Impact Assessment, providing foreign workers with a copy of the "Temporary Foreign Workers: Your rights are protected" summary prior to the commencement of their employment, and providing private health insurance for emergency medical care to foreign workers for periods not covered by provincial and territorial healthcare coverage.

Additional information on these new compliance requirements is available here.

Canada's Tech Talent Strategy

On June 27, 2023, the Minister of Immigration, Refugees and Citizenship Canada announced Canada's new Tech Talent Strategy, consisting of six initiatives aimed at attracting and retaining tech talent in Canada. For more information, please see our previous commentary available here.

For more information on any of the employment law updates we have outlined above, or any employment law-related matters, please contact a member of our Employment & Labour Group.

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[1] *Milwid v. IBM Canada Ltd.*, 2023 ONCA 702.

[2] *Lynch v. Avaya Canada Corporation*, 2023 ONCA 696.

[3] *Alberta Health Services v. Johnston*, 2023 ABKB 209.

[4] *Monterosso v. Metro Freightliner Hamilton Inc.*, 2023 ONCA 413.

[5] *Croke v. VuPoint Systems Ltd.*, 2023 ONSC 1234.
