Cassels

2018: The Year in Review in Employment Law

Jed Blackburn, Laurie Jessome, Kristin Taylor

January 2, 2019

We often say there is rarely a dull moment in employment law. This year, however, has been exceptionally eventful. From a pendulum swing caused by the change in government to statutory obligations in Ontario, to #metoo, to the legalization of cannabis and its impact on the workplace, it has been an exciting year. We recap the major developments in Ontario, Alberta, British Columbia and for federally-regulated employers below.

1. Statutory Changes in Ontario

a. Unravelling of Bill 148 and Enactment of the *Making Ontario Open for Business Act*

On November 21, 2018, Bill 47, the *Making Ontario Open for Business Act* (the Act) received royal assent and became law in Ontario. Although the Act preserved certain amendments introduced under Bill 148, the *Fair Workplaces, Betters Jobs Act, 2017*, including the right to extended parental and pregnancy leave and three weeks of paid vacation after five years of employment, it reversed many Bill 148 reforms. Some of the more significant changes to the *Employment Standards Act, 2000* (ESA) and *Labour Relations Act, 1995* (LRA) are:

- **Minimum Wage Freeze.** Ontario's minimum wage will remain at $14.00 per hour until October 2020, at which time annual inflation adjustments will restart.
- **Repeal of Personal Emergency Leave Provisions.** Ontario employees are no longer entitled to two paid and eight unpaid days of personal emergency leave per year. Instead, employees are entitled to up to three days of sick leave, two days of bereavement leave, and three days of family responsibility leave, all of which are unpaid.
- **Equal Pay for Equal Work.** Although employers in Ontario are still prohibited from providing different rates of pay based on an employee's sex, the prohibition on providing different rates of pay based on employment status (i.e., part-time, temporary or seasonal) has been repealed.
- **Scheduling.** Although most of the scheduling-related reforms introduced by Bill 148 have been repealed, the "three-hour rule" has been maintained. If an employee is regularly scheduled to work more than three hours, attends at work and works fewer than three hours, the employee is entitled to the greater of (1) the amount earned for the time worked plus the employee's regular rate for the remainder of the three hours, and (2) the employee's regular rate for three hours of work.
- **Remedial Certification.** The LRA has been amended to reinstate the pre-Bill 148 test and preconditions to certify a union as a remedy for employer misconduct. Certification in the event of employer contraventions of the LRA is available only if no other remedy would suffice to counter the

effects of the employer's contravention.
- **Return-to-Work Rights.** The Act has restored the six-month limit on an employee's right to reinstatement under the LRA following the start of a strike or lock-out.
- **Penalties under the LRA.** The maximum penalties for a contravention of the LRA have been decreased from $5,000 to $2,000 for individuals and from $100,000 to $25,000 for organizations.

The amendments to the LRA came into force on November 21, 2018, while the amendments to the ESA are effective January 1, 2019. For a full review of the amendments introduced under the Act, please see our previous article on the Act available here.

b. Ontario's *Pay Transparency Act, 2018* Delayed Indefinitely

After months of uncertainty, the Ontario government has officially postponed the coming into force of the *Pay Transparency Act, 2018*. Bill 57, the *Restoring Trust, Transparency and Accountability Act, 2018*, which received royal assent on December 6, 2018, delays the coming into force of the *Pay Transparency Act*, 2018 from January 1, 2019, to a date to be proclaimed by the government. For more information about the *Pay Transparency Act, 2018*, please refer to our previous article available here.

c. Introduction of Bill 66, *Restoring Ontario's Competitiveness Act, 2018*

On December 6, 2018, the Ontario government introduced Bill 66, the *Restoring Ontario's Competitiveness Act*. If passed, Bill 66 would amend the ESA as follows:

- **ESA Posters.** Employers in Ontario would no longer be required to post a copy of the Ministry of Labour's ESA poster in the workplace, but would still be required to provide a copy of the poster to each employee.
- **Excess Hours of Work.** Currently, the ESA permits an employee and their employer to agree that the employee will work more than 48 hours per week, up to a maximum of 60 hours per week. Any such agreement requires the approval of the Director of Employment Standards. Bill 66 would repeal the 60-hour per week cap and eliminate the need for employers to apply for the Director's approval of such agreements.
- **Overtime Averaging Agreements.** Bill 66 would eliminate the requirement that employers obtain the approval of the Director of Employment Standards to enter into agreements averaging an employee's hours of work to determine entitlement to overtime. Averaging agreements will be permitted for a period not exceeding four weeks.

Bill 66 has passed first reading, but is not yet law. We will provide further updates as it progresses.

2. Statutory Changes in Alberta

a. Alberta's *Fair and Family-friendly Workplaces Act*

Many of the amendments to Alberta's *Employment Standards* Code introduced in 2017 under Bill 17 – The *Fair and Family-friendly Workplaces Act* came into effect during 2018. Bill 17 represented the first substantial revision to Alberta's employment standards legislation since 1988 and introduced wide-ranging amendments, including the following:

- **Wages, Overtime, and Rest Periods.** Alberta's general minimum wage increased to $15 per hour (currently the highest in Canada), and employees with disabilities must be paid at or above the minimum wage. Overtime must be calculated at 1.5x for all hours worked, and can be banked for up to six months. Employees are entitled to a 30 minute break (which may be split into two 15 minute installments) for every five hours of consecutive work.
- **Termination notice periods.** Employers are prohibited from forcing employees to use entitlements such as vacation or overtime during notice periods. Termination pay is calculated based on the previous 13 weeks that the employee actually worked, rather than the 13 calendar weeks prior to termination. Notice periods for group terminations have been revised based upon the number of employees in the organization.
- **Leaves of Absence.** Employees are eligible for leave after 90 days of employment, as opposed to one year, and various new categories of unpaid leave have been introduced, including personal and family responsibility leave, long term illness and injury leave, bereavement leave, domestic violence leave, critical illness of an adult family member/child leave, and leave in the event of the death or disappearance of a child. Unpaid job protection for compassionate care leave has been increased to 27 weeks and can now include acting as the non-primary caregiver. Unpaid job protection for maternity leave/parental leave have been extended to 16 weeks and 62 weeks, respectively.
- **Youth employment.** The standard minimum age for employment has been increased from 12 to 13, and additional restrictions on the types/hours of work have been introduced for employees under the age of 18.

b. Occupational Health and Safety System Changes in Alberta

On June 1, 2018, Alberta implemented changes to its Occupational Health and Safety (OHS) system after conducting its first intensive review since 1976. The amendments to the *Occupational Health and Safety Act* expand workers' rights to understand the health and safety implications of their work, participate in workplace health and safety discussions, and refuse to perform dangerous tasks without reprisal. Various parties at work sites have had their roles and responsibilities clarified and expanded to increase accountability.

Joint work site health and safety committees are now required for all work sites with 20 or more workers where work is expected to last 90 days or more (work sites with less than 20 workers are still required to have a health and safety representative). Health and safety programs with ten mandatory elements

(including a health and safety policy, hazard assessment, and emergency response plan) are required for all work sites with 20 or more workers, and these programs must be reviewed at least every three years.

The changes have also expanded employer reporting obligations regarding workplace incidents and the scope of OHS inspections and investigations. Previously only injuries resulting in two-day hospitalizations were required to be reported, but now any injury resulting in a worker being admitted to the hospital, or even a potentially serious incident that did not result in injury, must be reported. OHS officers' powers have also been expanded, and include the ability to issue stop work orders applicable to all of an employer's work sites (not merely the work site implicated in the incident). OHS officers may also issue stop use orders requiring any measures the officer considers necessary to be taken to remove the source of the danger or protect any person from the danger. Workers affected by stop work or stop use orders are entitled to receive the same wages and benefits they would have received had the orders not been issued.

3. Statutory Changes in British Columbia

In 2018 British Columbia introduced amendments to its *Employment Standards Act* primarily focused on leaves of absences. Maternity leave can now begin up to 13 weeks prior to the expected birth date and has increased to up to 17 weeks overall, after which the pregnant employee is entitled to up to 61 weeks of unpaid leave. Employees who do not take maternity leave (including adopting parents) can take up to 62 weeks of unpaid leave that must commence within 78 weeks after birth. Compassionate care leave has been increased to up to 27 weeks, and two new leaves have been introduced in cases where there has been a disappearance or death of a child.

4. Federal Government Moves Forward with Significant Statutory Changes

On October 29, 2018, the federal government tabled Bill C-86, an omnibus budget implementation act which, among many other things, proposes to make substantial changes to the *Canada Labour Code* (the Code) and will enact a federal *Pay Equity Act*. Many of the changes proposed to the Code will look familiar to Ontario provincial employers, such as the obligation to provide 96 hours of notice prior to changing a work schedule, regulations for temporary help agencies, a specific leave for victims of family violence and the obligation to provide equal pay to part-time, casual, temporary and seasonal employees. Other major changes include adding meal break and minimum rest period entitlements, giving employees the right to take unpaid breaks that are necessary for medical reasons or to nurse or express milk, increasing vacation entitlement to 4 weeks after 10 years of service and, perhaps most notably, revamping employees' entitlement to notice of termination in the event of a without cause termination. Whereas previously the Code provided eligible employees with 2 weeks of notice of termination, Bill C-86 will give employees notice entitlements that vary between 2 and 8 weeks, depending on length of service. Bill C-86 also proposes to create a framework for a federal *Pay Equity Act* which would apply to all federally regulated workplaces with 10 or more employees. The nature of employers' obligations under the proposed Act will vary according to the size of their workforce but may include establishing a pay equity plan and a joint pay equity committee

and conducting a pay equity analysis, and where necessary, implementing appropriate remedial action. The Canadian Human Rights Commission will take on responsibility for processing complaints related to pay equity and a Pay Equity Commissioner will join the members of the Canadian Human Rights Commission. Bill C-86 received Royal Assent on December 13, 2018.

5. Interplay Between ESA Minimum Notice Requirements and Common Law

In September 2018, the Ontario Court of Appeal released its decision in *Wood v. CTS of Canada Co. (Wood)* and, in so doing, reaffirmed the distinction between the minimum notice requirements on termination under the Ontario *Employment Standards Act, 2000* (the ESA) and common law notice.

This case concerned the manner and timing of CTS of Canada Co.'s (CTS) provision of notice of the closure of its Streetsville manufacturing plant and the terminations resulting therefrom. Specifically, on April 17, 2014, CTS gave written notice to its employees of the impending closure of the facility effective March 27, 2015. The closure date was subsequently extended to June 26, 2015. The number and timing of the terminations triggered the "mass termination" provisions under section 58 of the ESA which, in turn, required CTS to file a Form 1 with the Ministry of Labour (the Ministry) at least eight weeks prior to the terminations and to post a copy in the workplace. In this case, CTS filed its Form 1 on May 12, 2015.

74 of the terminated employees brought a class action against CTS arguing that CTS was required by the ESA to provide the Form 1 Notice at the same time that it provided its original notice to employees on April 17, 2014, and that, since it failed to do so, CTS should not be given credit for any working notice prior to its filing of the Form 1. The motion judge agreed with the terminated employees and concluded that CTS's breach invalidated some 13 months of working notice provided.

The Ontario Court of Appeal overturned the motion judge's decision on this issue. While section 58 of the ESA requires that a Form 1 be provided to the Ministry and posted "on the first day of the notice period," the Court of Appeal interpreted this reference as relating to the statutory minimum notice period and not the greater common law notice provided in this case. Consequently, the Court of Appeal concluded that the Form 1 only needed to be filed with the Ministry and posted for the prescribed minimum notice period, in this case eight weeks. As the purpose of the ESA is to provide *minimum* standards and *minimum* periods of notice, to require a longer period of notice in this case would have been inconsistent with this purpose. In the result, while CTS was required to provide an additional 12 days pay in lieu of notice given that it only filed the Form 1 roughly six weeks before termination, it was indeed permitted to rely on its provision of more than 14 months working notice for common law purposes.

6. Termination Clauses to be Read as a Whole and Not Microanalyzed to Create Ambiguity

2018 also saw the Ontario Court of Appeal's release of the decision in *Amberber v. IBM Canada Ltd. (Amberber)* which, thankfully, brought some much needed clarity to the interpretation of termination clauses

and, arguably, put the brakes on the perceived practice of some judges of microanalyzing termination clauses with a view to finding any possible basis to invalidate them.

The termination clause in question in *Amberber* entitled Mr. Amberber, a former employee of IBM Canada Ltd. (IBM), to the greater of one months' base salary or one week of base salary for every 6 months of completed employment to a maximum of twelve months' salary (the Termination Entitlement). On IBM's motion for summary judgment, the motion judge held that the termination clause was ambiguous in that it did not clearly set out an intention to deprive Mr. Amberber of his entitlement to common law notice of termination.

The basis for this conclusion? Although the termination clause explicitly noted that the aforementioned Termination Entitlement included "any and all termination notice pay, and severance payments [Mr. Amberber] may be entitled to under provincial employment standards legislation and Common Law" (the Inclusive Payment Provision) and that Mr. Amberber would receive his statutory entitlements under applicable employment standards legislation if they were ever greater than the Termination Entitlement (the Failsafe Provision), the motion judge pointed to the placement of the Inclusive Payment Provision before the Failsafe Provision as creating confusion as to whether, in the event the Termination Entitlement were ever less than Mr. Amberber's statutory entitlement, the statutory entitlement would be considered to include his common law entitlement. As such, the motion judge effectively nullified the termination clause and held that Mr. Amberber was entitled to damages at common law.

IBM appealed the decision to the Ontario Court of Appeal which ultimately overturned the motion judge's ruling. According to the Court of Appeal, "the fundamental error made by the motion judge is that she subdivided the termination clause into what she regarded as its constituent parts and interpreted them individually" rather than interpreting the provision as a whole. The Court of Appeal held that the motion judge's conclusion that the Inclusive Payment provision only applied to one part of the clause but not the other gave the clause "a strained and unreasonable interpretation" and "created an ambiguity where none exists." As such, the termination clause was held to be enforceable.

7. #MeToo in the Workplace

According to Statistics Canada, there has been a sharp increase in police-reported sexual assaults in the three month period after New York Times published its expose of Harvey Weinstein's sexual misconduct in Hollywood and Alyssa Milano tweeted the #MeToo hashtag that went viral. The researchers attribute the spike to heightened awareness of what constitutes sexual assault, public messages from police forces urging victims to come forward and changes to police practices on classifying sexual assaults as founded or unfounded.

The effect on the number of gender-based discrimination cases and complaints filed across Canada appears to be mixed with Ontario and British Columbia reporting no significant increases and Nova Scotia

and Manitoba confirming increases.

Certainly our experience over the last year has been an increase in the number of internal complaints as people, mostly women, are feeling empowered to come forward. Where complaints are filed, there seems to be an expectation that action will be taken swiftly and decisively. In Ontario, the Ministry of Labour can now order a company to conduct an investigation by an impartial person at the employer's expense. Employers remain obliged to ensure both complainant and respondent are treated fairly in the investigation. This can put pressure on an employer to retain a third-party investigator to ensure that the investigation is conducted properly. This also assists in the event of scrutiny by the courts or, has become more common in 2018, the media.

A related development this year also is the standing granted to a victim of sexual harassment to be an intervenor in the wrongful dismissal trial of her harassed. You can read our summary of the decision here. It is hard to imagine this same result but for the spotlight on workplace sexual harassment issues by virtue of #MeToo.

8. Legalization of Cannabis

On October 17, 2018, the federal government's *Cannabis Act* came into force. The new legislation not only legalized the recreational use of cannabis across Canada, but ushered in a new era for employers who now have to address the impact of legalization on their workplaces. Although the laws related to recreational cannabis are new and developing, employers can clear the haze by getting informed and taking action.

The key facts about the legalization of recreational cannabis that all employers should know are:

- **Adult Possession.** Adults who are at least 18 years of age (or older, depending on the province or territory) can possess up to 30 grams of legal cannabis, dried or equivalent in non-dried form, in public. Possession by minors or by adults in excess of the prescribed amount is illegal.
- **Legal Cannabis Products.** Adults can legally purchase fresh or dried cannabis, cannabis oils and seeds or plants from authorized retailers. They cannot yet legally purchase other products, including edibles, cannabis extracts, and cannabis topicals.
- **Authorized Retailers.** Legal cannabis products are only sold through retailers authorized by the provincial or territorial governments. Legal cannabis products have an excise stamp on the package, the standardized cannabis symbol, and health warnings. Cannabis products obtained from any other source are illegal.
- **Provincial/Territorial Differences.** Each province and territory has its own rules for cannabis, including the legal minimum age, where adults can buy it, and where adults can use it. Municipalities can also pass bylaws to regulate the use of cannabis locally. Possession and use in contravention of local laws is illegal.
- **Travelling.** It is illegal to take cannabis across the Canadian border, whether coming into Canada or

leaving. This applies to all countries, whether cannabis is legal or not.
- **Impaired Driving.** It is illegal to drive when impaired by recreational cannabis or any other drug.

Since the possession and use of cannabis outside of what the law allows remains illegal, employers can and should rely on local laws, incorporate them into their workplace policies and procedures, and discipline employees for undertaking any illegal conduct in the workplace. Accordingly, the key actions employers should take to address the impact of legalization on their workplaces are:

- **Implement Policies.** Employers have the right to establish rules for the recreational use of cannabis in the workplace in much the same way that employers have the right to set rules for the use of alcohol or tobacco products. In particular, employers may prohibit the use of recreational cannabis at work or during working hours and can also prohibit employees from attending work while impaired. Employers should review and revise their workplace policies to address cannabis legalization, impairment, smoke free workplace and scent free workplace obligations.
- **Conduct Employee Training.** In tandem with the introduction of new policies directed at recreational cannabis in the workplace, employers should train employees on the new policies and their post-legalization workplace expectations. Employers, especially those with safety-sensitive workplaces, should also train supervisors and managers on issues including signs of impairment and workplace protocols when an employee is suspected or determined to be impaired in the workplace by any substance, including recreational cannabis.
- **Understand the Duty to Accommodate.** The line between recreational and medical cannabis use is not hazy from a legal perspective. Employers do not have a duty to accommodate recreational cannabis use and can treat such use in substantially the same way as recreational alcohol consumption under an employer's workplace policies. Violation of workplace policies related to recreational use of cannabis can result in progressive discipline and, in appropriate cases, termination of the employment relationship. Employers continue to have an obligation to accommodate medical cannabis use when it is prescribed by a medical practitioner as treatment for a disability covered by applicable human rights law.

For more information on these topics, or any employment law related matters, please contact any member of our Employment & Labour Group.
