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# MARIJUANA POSSESSION AND USE AT WORK JUSTIFIED DISMISSAL, DESPITE EMPLOYEE'S "DRUG PROBLEM"

*— Adrian Miedema. © Dentons Canada LLP. Reproduced with permission. Adrian Miedema is a Partner with Dentons Canada LLP in Toronto, and the Co-Editor of www.occupationalhealthandsafetylaw.com.*

A mining company employee was properly dismissed for possessing and using marijuana at work, a labour arbitrator has held. And the employee had not proven that he had a drug problem that required the employer to accommodate.

The employee worked as a Plating Tankman at Vale's refinery in Thompson, Manitoba. The company had alcohol and drug policies aimed at safety in the workplace. The policies prohibited use and possession of illicit drugs at work. The arbitrator decided that the evidence was clear that despite the company's efforts, there was a drug problem in the workplace.

The employee admitted that he had worked under the influence. He argued, though, that under human rights legislation, the employer was required to accommodate his "drug problem". According to the arbitrator, the employee "described a pattern of marijuana use and abuse that was certainly consistent with an addiction illness." The employee claimed that he had been a heavy marijuana user since about age fifteen. He also claimed that the Addictions Foundation of Manitoba, where he had taken treatment, confirmed that he had an addiction diagnosis.

However, the arbitrator decided that the employee's failure to produce, at arbitration, a formal written diagnosis of addiction from the Addictions Foundation of Manitoba led to an "adverse inference" that the report would not support the employee's claim that he was addicted. Further, the employee's testimony about his pattern of marijuana use was questionable due to the problems with the employee's credibility; he had been dishonest with the company when he was initially confronted about his marijuana use at work.

As a result, the arbitrator decided that the employee "had a problem with marijuana use but a dependency or addiction was not established on the evidence." As such, he was not entitled to accommodation under human rights legislation.

The arbitrator decided that the drug use in this case was "especially egregious in that there was ongoing and frequent use with a hidden drug cache on the premises." The company had just cause to dismiss the employee.

*Vale (Manitoba Operations) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 6166* (Arne Peltz, Labour Arbitrator, August 2, 2013).

*This article originally appeared on www.occupationalhealthandsafetylaw.com.*

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## Q & A

### Are Students Who Are Hired for the Summer Subject to Employment Insurance Deductions?

If the students are replacing regular employees and are remunerated by the hour, week, or other regular wages, there is an employee-employer relationship between the students and the employer. In such a case, the students would be subject to the regular statutory deductions.

The employer must deduct income taxes (based on the student's TD1 completion), Canada Pension Plan contributions (if age 18 or over), and Employment Insurance premiums according to the Canada Revenue Agency's rules and regulations.

# THE SHIFTING WORLD OF FOREIGN WORKERS

*— By Parisa Nikfarjam. © Rubin Thomlinson LLP.*

The past year has meant significant changes for employers who are (or are considering) recruiting temporary foreign workers. Canada's Temporary Foreign Worker Program ("TFWP") has undergone a number of rule changes, particularly with respect to the process of obtaining the Labour Market Opinion ("LMO").

The purpose of the new rules is to encourage, and ensure, that employers look for qualified Canadian citizens or permanent residents before hiring foreign workers.

The full list of changes is available on the Government of Canda website at news.gc.ca/web/article-en.do?nid=762059. The key changes are described below:

- **Fee per temporary foreign worker**. Employers must pay a fee of $275 per temporary foreign worker requested in order to obtain the LMO necessary to recruit a foreign worker.
- **Recruitment process more complex**. There are new procedures for recruiting foreign workers, which lengthen the hiring process. These new procedures require that:
  - Employers advertise available positions in Canada for at least four consecutive weeks (rather than two weeks) before applying for an LMO.
  - Employers post the position on the national Job Bank or its provincial/territorial equivalent for positions located in British Columbia, Saskatchewan, the Northwest Territories, Quebec, or Newfoundland and Labrador.
  - Employers advertise the position through at least two or more methods of recruitment (in addition to the Job Bank/provincial equivalent listing). These recruitment measures can be specialized websites for the industry as long as they are national in scope.
  - Employers list their name and wage information for NOC 0 and A positions.
  - Employers continue to actively recruit Canadians and permanent residents for a position until the date they are notified that an LMO has been issued.
- **Language requirements**. The only languages that can be identified as a job requirement are English and French, unless an employer can demonstrate that another language is a *bona fide* job requirement.
- **Employer declaration**. Employers will now need to declare that the recruitment of a foreign worker "is not expected to lead to job loss by any Canadian or permanent resident for the duration of the Labour Market Opinion and for *two years thereafter*."

These new rules are some of the many new changes affecting employers employing foreign workers. Service Canada and Immigration Canada officers may soon have new investigative powers to enter and inspect premises for breaches of the TFWP requirements.

Since the above requirements came into force in July 2013, they have proven to be too burdensome for some employers. For instance, the complexity of the recruitment process, which now requires jobs to be posted longer, and in more locations, may not be an efficient use of resources for an organization seeking to fill a need. Moreover, an employer may not choose to pursue an LMO if it needs to disclose its name and the position's salary in the job advertisement, particularly if it does not want the availability of this position in the organization and its salary ranges to be public knowledge.

These issues have resulted in frustration for various employers, like Janet Ecker, President and Chief Executive Officer of the Toronto Financial Services Alliance, who commented that "unfortunately, the reach of the changes and the impact of their changes is significantly interfering with a company's ability to hire that [top] level of talent if that person is from another country." These frustrations are seemingly being acknowledged by Employment Minister Jason Kenney who has, as of January 2014, pledged a second round of reforms within the next two or three months. These additional reforms may include a new fast-track system for high-skill positions.

While we await the potential new reforms, employers should remain mindful of their existing obligations. With the more robust recruitment rules for foreign workers, employers and their human resources teams may need to review their practices, and put in place processes that keep in mind the complexities and often lengthier timelines associated with hiring foreign workers.

Employers would therefore be wise to consider drafting clear and concise policies or contracts in order to encourage consistent and appropriate procedures in matters relating to the recruitment and management of foreign workers. Such policies, if designed and effectively implemented, can contribute significantly not only in compliance with all relevant regulations but also in reducing potential general employment conflict issues relating to their treatment.

Policies and contracts respecting foreign workers should ideally include, at a minimum, information on the following:

- Policy objectives — To describe the principles guiding the design of a policy aimed at foreign workers.
- Internal responsibility — Clear direction regarding responsibility for various components described under a policy, including authorization for any process to approve recruitment, promotions, wage increases for foreign workers, etc.
- Contractual clauses regarding: term of employment, nature of employment, position, job description, salary/wages, and termination.

Given the often complex nature of employing foreign workers, employers may find that drafting comprehensive policies and/or employment contracts involving foreign workers can often be a tricky matter. Employers would accordingly be wise to seek the assistance of experienced employment law counsel in doing so.

# LEGISLATIVE UPDATE

## Federal Government Introduces the *Economic Action Plan 2014 Act, No. 1*

Bill C-31, the *Economic Action Plan 2014 Act, No. 1*, was introduced on March 28, 2014 and received second reading on April 8. The large, omnibus Bill proposes amendments to a number of federal statutes and regulations related to employment and labour. Below is an overview of some of the significant provisions.

### Employment Insurance and Canada Pension Plan Remittance Thresholds

Amendments to the *Insurable Earnings and Collection of Premiums Regulations* and the *Canada Pension Plan Regulations* would increase the threshold of average monthly remittances for determining an employer's remittance cycle. The proposed new thresholds would reduce the frequency of remittance of source deductions for some small and medium-sized employers.

The proposed amendments would change the thresholds as follows:

| Remittance Cycle | Current Monthly Average Remittance | Proposed New Monthly Average Remittance |
|---|---|---|
| Regular or Monthly Remitters | less than $15,000 | less than $25,000 |
| Threshold 1 Remitters | $15,000 or more but less than $50,000 | $25,000 or more but less than $100,000 |
| Threshold 2 Remitters | $50,000 or more | $100,000 or more |

## Enhanced Access To Sick Leave and Sickness Benefits

If passed, Bill C-31 would amend the *Canada Labour Code* to provide that an employee who is on compassionate care leave, critically ill child care leave, or crime-related child death or disappearance leave may interrupt his or her leave in order to take sick leave or a leave related to a work-related illness or injury.

Where an employee intends to interrupt his or her leave, he or she would have to provide written notice as soon as possible. The interrupted leave would resume immediately after the interruption ends.

Other minor amendments to the *Canada Labour Code* would clarify certain notice requirements for compassionate care leave, critically ill child care leave, and crime-related child death or disappearance leave.

The *Employment Insurance Act* would also be amended to allow access to Employment Insurance ("EI") sickness benefits for employees who take time off work to care for a critically ill family member.

Currently, individuals cannot access EI sickness benefits while they are receiving compassionate care benefits or critically ill child care benefits due to a requirement for applicants to be "otherwise available for work." The new provisions would waive this requirement for those receiving compassionate care benefits or critically ill child care benefits, thereby allowing employees who become ill or injured while on compassionate care leave or critically ill child care leave to apply for EI sickness benefits.

## Administrative Tribunals Support Service

If passed, Bill C-31 would enact the *Administrative Tribunals Support Service of Canada Act* (the "ATSSC"), which would administer facilities and support services for 11 administrative tribunals, including the Canada Industrial Relations Board, the Canadian Human Rights Tribunal, the Social Security Tribunal, and the Public Service Labour Relations and Employment Board.

The ATSSC would establish the Administrative Tribunals Support Service of Canada as a portion of the federal public administration. This service would become the sole provider of resources and staff for each of the tribunals, and existing staff of the tribunals would become staff of the service.

The ATSSC would provide for the appointment of a chief administrator, for a term of up to five years, who would be responsible for the provision of facilities and support services for each administrative tribunal. However, the ATSSC specifies that the chairperson of each tribunal "continues to have supervision over and direction of the work of the tribunal."

Consequential amendments would also be made to many Acts, including the *Canada Labour Code* and the *Canadian Human Rights Act*.

## Hazardous Products in the Workplace

Bill C-31 would amend the *Canada Labour Code*, the *Hazardous Products Act*, and the *Hazardous Materials Information Review Act* to improve regulation and labelling of hazardous products used in the workplace.

Among other things, the amendments would implement the *Globally Harmonized System of Classification and Labelling of Chemicals*, which is currently used by the United States and a number of other countries.

### Public Service Labour Relations

A proposed amendment to the *Public Service Labour Relations Act* would clarify that an adjudicator has the power to grant a remedy where it has determined that an employer has engaged in a discriminatory practice as set out in the *Canadian Human Rights Act*.

Bill C-31 would also clarify certain transitional provisions contained in the *Economic Action Plan 2013 Act, No. 2*, SC 2013, c. 40. These transitional provisions are related to amendments to the essential services regime under the *Public Service Labour Relations Act*.

### Hiring of Foreign Workers

Proposed amendments to the *Immigration and Refugee Protection Act* would allow regulations to be made that impose a system of monetary penalties for employers that contravene the conditions for hiring foreign workers.

### Apprentice Loans

Bill C-31 would also establish the *Apprentice Loan Act*, which would provide financial assistance for eligible apprentices registered in eligible trades to help cover the cost of apprenticeship training.

## *Canadian Human Rights Act* Amended

Effective April 1, 2014, section 66(3) of the *Canadian Human Rights Act* was repealed by the *Northwest Territories Devolution Act*, SC 2014, c. 2.

Section 66(3) is related to an exception to the application of the *Canadian Human Rights Act* to matters respecting the Government of the Northwest Territories contained in section 66(1).

The *Northwest Territories Devolution Act* received Royal Assent on March 25, 2014.

## British Columbia Bill Would Amend New *Pension Benefits Standards Act*

Bill 10, the *Pension Benefits Standards Amendment Act, 2014*, which would amend Bill 38, the new *Pension Benefits Standards Act*, SBC 2012, c. 30 (which received Royal Assent on May 31, 2012, but is not yet in force) received first reading on February 19, 2014 and second reading on March 12. The amendments are mainly technical corrections, including:

- clarifying that a pension plan is not liable after transferring responsibility for pensions to a regulated insurance company, as long as specific conditions are met;
- enabling the spouse of a deceased pension plan member to designate a beneficiary for the surviving spouse's benefits;
- providing that a former participating employer who fails to provide required information to the plan administrator may be compelled to comply by court order; and
- clarifying that the member consent required for distribution of actuarial excess or surplus does not apply to withdrawals from a solvency reserve account.

## The *Pooled Registered Pension Plans Act* Re-Introduced in British Columbia

The British Columbia government introduced Bill 9, the *Pooled Registered Pension Plans Act*, on February 19, 2014, and it received second reading on March 12. A previous bill (Bill 16) relating to pooled registered pension plans ("PRPPs") failed to pass prior to the British Columbia election. Bill 9 re-introduces legislation that will allow small and medium-size business employees as well as the self-employed to join pension plans administered by regulated financial institutions. PRPPs are already available to federal employers. Alberta and Saskatchewan have also enacted PRPP legislation. Quebec recently passed the *Voluntary Retirement Savings Plans Act*, which provides for a similar type of plan.

## British Columbia's *Miscellaneous Statutes Amendment Act*

Bill 17, the *Miscellaneous Statutes Amendment Act, 2014*, was introduced in the legislature on March 10, 2014 and received second reading on March 24. If passed, the Bill will amend several statutes, including the *Workers Compensation Act*.

The proposed amendment to the *Workers Compensation Act* will restore heart disease in firefighters to the list of presumptive diseases recognized by WorkSafeBC. If a firefighter suffers from heart disease or a heart injury, including a heart attack, it will be presumed to be due to his or her work as a firefighter unless the contrary is proved.

## Manitoba Amends *The Workplace Safety and Health Act*

*The Workplace Safety and Health Amendment Act*, SM 2013, c. 9 (formerly Bill 31), came into force on April 1, 2014.

Key changes include:

- enabling a stop work order to apply to all workplaces of an employer when similar activities at multiple workplaces involve, or are likely to involve, an imminent risk of serious physical or health injury;
- providing for the appointment of a chief prevention officer and setting out the officer's mandate;
- strengthening provisions for a worker exercising his or her right to refuse unsafe work;
- requiring a worker safety and health representative in every workplace with five or more workers, rather than 10 or more;
- requiring a workplace safety and health committee in seasonal workplaces, if there are at least 20 workers and the work is expected to continue for at least 90 days;
- clarifying provisions for paid training and other activities of worker safety and health representatives and committee members; and
- expanding the list of activities or contraventions for which administrative penalties may be imposed, and strengthening the enforcement of those penalties.

In addition, consequential amendments are made to *The Workers' Compensation Act*.

*The Workplace Safety and Health Amendment Act* received first reading on April 29, 2013, second reading on September 4, and third reading and Royal Assent on September 13.

## Manitoba Proposes Amendments Aimed at Protecting Temporary Employees and Foreign Workers

On April 15, 2014, Bill 50, *The Protection for Temporary Help Workers Act (Worker Recruitment and Protection Act and Employment Standards Code Amended)*, received first reading. Some of the most important proposed amendments are discussed below.

Bill 50 would, if passed, amend *The Worker Recruitment and Protection Act* by including definitions of "temporary help employee", "temporary help agency", and "client" (in relation to temporary help agencies) and requiring that all temporary help agencies be licensed. In addition, Bill 50 would prohibit temporary help agencies from:

- charging fees to individuals for becoming temporary help employees;
- charging fees to temporary help employees connected with assignment (or attempted assignment) to perform work with a client (or a potential client);
- charging fees to temporary help employees for entering into an employment relationship with a client;
- restricting temporary help employees from becoming employees of a client;
- restricting a client from employing a temporary help employee;
- restricting a client from providing a reference to a temporary help employee;

- charging a client a fee where a temporary help employee becomes an employee of the client (subject to regulation); and
- charging fees to, or imposing restrictions on, temporary help employees or clients, where such fees or restrictions are precluded by regulation.

If passed, Bill 50 would specify that any provision in an agreement made between a temporary help agency and a client or a temporary help employee that is inconsistent with the new temporary help agency provisions in *The Worker Recruitment and Protection Act* is void. The new temporary help agency provisions would apply to all agreements between agencies and their employees and clients, regardless of whether entered into prior to October 1, 2014.

Another proposed amendment to *The Worker Recruitment and Protection Act* would permit the Director of Employment Standards to authorize, in writing, an employer to use an unlicensed foreign worker recruiter in instances where the employer is qualified to be registered to recruit a foreign worker, the employer has applied for registration, and "the wages to be paid by the employer in respect of the position to be filled by a foreign worker will be at least two times the Manitoba industrial average wage, as prescribed by regulation under *The Employment Standards Code*."

Record-keeping requirements would be modified for licensees, as well as for unlicensed individuals who are authorized to recruit foreign workers.

Bill 50 would also amend *The Employment Standards Code* by adding comparable definitions for "temporary help agency", "temporary help employee", and "client" (in relation to temporary help agencies), by specifying that a temporary help agency is the employer of its temporary help employees, and by clarifying that the employment relationship continues where a temporary help employee is assigned "by the agency to perform temporary work for a client." Also, the Bill would include an amendment providing that, subject to regulation, temporary help employees are not covered by the exception from the notice of termination requirements set out in section 62(1)*(e)* of *The Employment Standards Code*.

If passed, Bill 50 would come into force on October 1, 2014.

## Manitoba Introduces Amendments Which Would Require the Labour Board To Implement Time Lines for Hearings and Decisions

On April 17, 2014, Bill 54, *The Labour Relations Amendment Act (Time Lines for Labour Board Decisions and Hearings)* was introduced. If passed, Bill 54 would amend *The Labour Relations Act* to require the Labour Board (the "Board") to make regulations establishing time lines within which decisions on complaints, applications, or referrals must be rendered following the conclusion of a hearing. In addition, the Board would be required to make regulations respecting the time within which hearings on applications for certification and decertification must be held. These regulations could provide the chairperson of the Board, in exceptional circumstances, with the discretion to extend a time limit with respect to a specific case or to extend the time limit applicable to the provision of written reasons.

If passed, Bill 54 would require the Board to make the required regulations within one year. The Board would have to review these regulations within two years of Bill 54 coming into force, and at least every six years thereafter. Bill 54 would come into force on Royal Assent.

## Saskatchewan's Minimum Wage Will Increase on October 1

The Government of Saskatchewan recently announced that Saskatchewan's minimum wage will increase from $10 per hour to $10.20 per hour, effective October 1, 2014.

## *The Saskatchewan Employment Amendment Act, 2013* Receives Second Reading

Bill 128, *The Saskatchewan Employment Amendment Act, 2013* has received second reading.

If passed, Bill 128 would amend Saskatchewan's new employment and labour legislation, *The Saskatchewan Employment Act*, SS 2013, c. S-15.1. *The Saskatchewan Employment Act* received Royal Assent on May 15, 2013, but has not yet

been proclaimed in force.

Bill 128 received first reading on December 4, 2013 and second reading on March 31, 2014. For further details of the amendments in Bill 128, see the *Ultimate HR Manual — Western Edition* Newsletter No. 78 from December 2013.

## Saskatchewan Files First Regulations Under New Employment and Labour Legislation

Saskatchewan has filed the first two regulations under *The Saskatchewan Employment Act*, SS 2013, c. S-15.1, the comprehensive new employment and labour legislation that received Royal Assent on May 15, 2013, but has not yet been proclaimed in force. Some of the most important provisions of the new regulations are discussed below.

*The Saskatchewan Employment (Labour Relations Board) Regulations*, RRS, c. S-15.1, Reg 1 (the "LRB Regulations"), were filed on March 25, 2014, and will "come into force on the day on which section 1-1 of *The Saskatchewan Employment Act* comes into force".

The LRB Regulations contain a number of forms that will be used by the Labour Relations Board and set out rules with regard to their filing. In addition, the LRB Regulations contain information about a variety of topics, such as:

- replies;
- intervention;
- conduct of votes under *The Saskatchewan Employment Act* or the LRB Regulations;
- hearings;
- adjournments;
- service of forms and documents;
- applications for summary dismissal; and
- applications for reconsideration.

*The Minimum Wage Regulations, 2014*, RRS, c. S-15.1, Reg 3, were filed on March 28, 2014. *The Minimum Wage Regulations, 2014* will come into force on the day that section 2-1 of *The Saskatchewan Employment Act* comes into force.

*The Minimum Wage Regulations, 2014* set out a formula according to which the provincial minimum wage may be adjusted each year. This formula incorporates the percentage change for the preceding year of both the "average hourly wage for employees 15 years of age and over for Saskatchewan as published monthly by Statistics Canada" and the "Consumer Price Index for Saskatchewan as published monthly by Statistics Canada".

The minimum wage rate may be fixed yearly, on or before June 30, by the Lieutenant Governor in Council, and covers the pay period from October 1 of that year until September 30 of the subsequent year. According to section 3(7), where the Lieutenant Governor in Council does not fix a new rate by June 30, the rate for the upcoming pay period will be the same as in the previous one, and the minister responsible for administering *The Saskatchewan Employment Act* shall notify the public accordingly. As soon as reasonably possible after June 30 each year, the minister must ensure that the minimum wage rate for the upcoming pay period is published in *The Saskatchewan Gazette* and otherwise brought to the attention of the public.

In addition, *The Minimum Wage Regulations*, RRS c. L-1, which are currently in force, will be renamed as *The Conditions of Employment Regulations*, and sections 2 and 4 (which deal with minimum wage rates and statements of earnings) will be repealed.

Employees (other than certain enumerated employees) who are required to report to work (other than for overtime), "shall be paid a minimum sum equal to three times the employee's hourly wage, whether or not the employee is required to be on duty for three hours on that occasion." A copy of *The Minimum Wage Regulations, 2014* and *The Conditions of Employment Regulations* (or an abstract thereof) will have to be posted conspicuously in the place where employees are working, and a copy (or an abstract) must be provided at the time of hiring to each employee who requests one.

## EDITORIAL NOTE

In the most recent print release of the *Ultimate HR Manual — Western Edition* (Release No. 27, March 2014), Alberta's compassionate care leave was added to the Miscellaneous Leaves of Absence commentary. However, a corresponding update should also have been made to the Administration: Employee Records, Postings, and Penalties commentary at ¶11-006, indicating that copies of documentation relating to compassionate care leave must be kept by employers in Alberta. This material will be added to the next print release.

# ON THE CASE

## Union Should Not be Deprived of Home Address and Telephone Information of Bargaining Unit Members

Supreme Court of Canada, February 7, 2014

Bernard was a member of a bargaining unit in the federal public service, although she did not belong to the union. She was entitled to the benefits of the collective agreement and representation by the union, and was required to pay union dues, making her a "Rand Formula employee". The union requested home contact information for bargaining unit members in order to carry out its representational obligations, and the employer refused. The union brought an unfair labour practice complaint. The Public Service Labour Relations Board (the "Board") allowed the complaint, although the Board asked for more information about several privacy-related issues. The parties reached an agreement about remedy, and the Board incorporated their agreement into its order. The agreement set out that the employer would disclose to the union, on a quarterly basis, the home mailing address and home telephone number of bargaining unit members, subject to some conditions related to security and privacy. Bernard brought an application for judicial review, claiming the Board's order required the employer to violate the *Privacy Act* by disclosing her personal information without consent, that she should have been given notice of the proceedings, and that the Board's order breached her *Canadian Charter of Rights and Freedoms* ("Charter") right not to associate with the union. The Federal Court of Appeal remitted the matter to the Board to consider the privacy implications. The Board found its order conformed to privacy concerns, though it added two additional safeguards. Bernard's application for judicial review was dismissed. Bernard appealed.

The appeal was dismissed. It was reasonable for the Board to find that the employer's refusal to disclose employee home contact information constituted an unfair labour practice because it interfered with the union's representation of employees. The union required effective means of contacting employees in order to discharge its representational duties, and employee work contact information was not sufficient to enable the union to carry out its duties. In addition, the union must be on an equal footing with the employer with respect to information relevant to the collective bargaining relationship. The union owed legal obligations to all employees and may be required to communicate with them quickly. With respect to privacy concerns, the Board reasonably concluded that the union needed employee home contact information to represent the interests of employees, which was consistent with the purpose for which the government employer collected the information, namely contacting employees about terms and conditions of employment. Finally, the compelled disclosure of home contact information in order to allow a union to carry out its representational obligations to all bargaining unit members did not engage Bernard's freedom not to associate with the union.

A partial dissent found that the Board erred in refusing to consider Bernard's freedom of association arguments. The Board had both the authority and the duty to decide Bernard's Charter arguments.

*Bernard v. Canada (AG)*, 2014 CLLC ¶220-014

## Medical Resident Awarded Lost Wages, Certain Expenses, and $75,000 for Injury to Dignity, Feelings, and Self-Respect

British Columbia Human Rights Tribunal, December 17, 2013

Kelly was enrolled in the Family Practice Residency Program (the "Program"), administered by the Faculty of Medicine at the University of British Columbia ("UBC"). Kelly suffered from ADHD and had a non-verbal learning disability. UBC terminated Kelly's enrollment in the Program for unsuitability. He was given two months' severance and received Employment Insurance benefits. Kelly brought a human rights complaint alleging discrimination in the provision of a service and employment, based on mental disability. The Tribunal found the complaint justified. After the decision, Kelly returned to the Program, with accommodations, and was progressing through the rotations. Kelly sought compensation for lost wages and expenses, as well as damages for injury to dignity, feelings, and self-respect. UBC believed the appropriate remedy was reinstatement in the Program.

Kelly was awarded lost wages, certain expenses, and damages for injury to dignity, feelings, and self-respect. While there was a possibility that Kelly might not complete the Program, there was no evidence to find that it was a probable outcome. UBC provided Kelly with reasonable accommodation, and Kelly demonstrated success in the Program since his return. There was a 10 per cent reduction in the wage loss award to reflect the possibility that Kelly might not complete the Program. The termination delayed Kelly's entry into the labour market as a family physician by six years. Since Kelly required additional time to complete both the Program and his medical degree, it was reasonable to find he would take some time prior to maintaining a full-time practice. A reduction in the wage loss award of 20 per cent was appropriate. Kelly was not entitled to wage loss past the date he would enter the labour market as a family physician. Once he has successfully completed the Program and obtained the proper certification, there was no evidence that he would suffer any further ongoing loss to his ability to earn income arising out of the discrimination. Kelly was awarded $385,194.70 as compensation for lost wages, as well as amounts for expenses and tuition fees. Kelly's termination left him unable to complete his training and realize his life-long dream of becoming a physician, and he suffered humiliation, embarrassment, and depression. Therefore, he was awarded $75,000 as damages for injury to dignity, feelings, and self-respect.

*Kelly v. University of British Columbia*, 2014 CLLC ¶230-010

## Employee Was a Drug User at the Time of his Termination, Not a Drug Addict

Court of Queen's Bench of Alberta, December 23, 2013

Elk Valley Coal Corporation ("Elk Valley") had an alcohol and drug policy stating that employees could seek rehabilitation without reprisal prior to a work-related accident, but discipline or termination could not be avoided if help was sought after an accident occurred. Stewart was operating a loader truck as an employee of Elk Valley when he struck another truck. He was obliged to undergo a drug test, which came back positive. Stewart admitted to the regular use of cocaine on his days off, and he came to realize after the fact that he had a problem and that he was addicted to cocaine at the time of the accident. Stewart was terminated for violating Elk Valley's drug and alcohol abuse policy. He filed a human rights complaint, alleging that he was fired on account of his addiction. The Tribunal found that there was no *prima facie* case of discrimination. According to the Tribunal, Stewart was not fired because of his disability; rather, he was fired due to his failure to stop using drugs, his failure to stop being impaired in the workplace, and his failure to disclose his drug use. Stewart appealed.

The appeal was dismissed. The Tribunal was correct in finding no causal connection between Stewart's disability and his termination. Stewart was terminated for failing to stop using drugs and for failing to disclose his drug use. Prior to the accident, Stewart did not believe that he was an addict, and he believed that he was in control of his drug use. Since he was a drug user, rather than an addict, at the time of the accident, the decision to terminate his employment was not based on arbitrary or preconceived stereotypes. The Tribunal was not preoccupied with Elk Valley's intent when firing Stewart. At the *prima facie* stage, it was appropriate for the Tribunal to consider the possible safety risk of drug use on the job. Therefore, there was no *prima facie* case of discrimination. The Court noted that the Tribunal had,

however, erred in finding that Stewart was an "individual with a disability" who was capable of seeking accommodation prior to the accident; if not for its finding respecting *prima facie* discrimination, the Court would have allowed the appeal on the accommodation issue.

*Bish v. Elk Valley Coal Corp.*, 2014 CLLC ¶230-012

## Constructively Dismissed Employee Failed To Mitigate his Damages Since he Refused Offer To Return To Work

Supreme Court of British Columbia, January 7, 2014

Gillwood Remanufacturing Inc. ("Gillwood") owned and operated a mill. Hooge began working for the mill under a different corporate entity in 1975, and had moved up the ranks to the non-union position of production supervisor. There had been three changes of ownership of the mill, although Hooge's position remained the same through each ownership change. Gillwood bought the mill in 2011, and informed Hooge that he was being laid off indefinitely due to a shortage of work. Hooge believed that the layoff was a fundamental breach of the employment relationship, and informed Gillwood that he would seek damages. Gillwood called Hooge back to work. He refused, and brought an action for constructive dismissal.

The action was allowed. There was no contract of employment term, either express or implied, providing for layoffs of salaried employees, and Hooge did not accept the layoff. As a result, Hooge was terminated when he was laid off, and was therefore entitled to reasonable notice or pay in lieu. Hooge, a 57-year-old employee with 36 years of service, was continuously employed at the mill through each change in legal ownership, without a change in salary or benefits. As a production supervisor, he was involved in daily management and quality control, and was entitled to 18 months' reasonable notice. Respecting mitigation, Gillwood was concerned about the financial viability of the company and was looking for ways to improve its productivity; it was not specifically targeting Hooge. Hooge was provided with an offer to return to his same position, at the same pay, and it was not clear that he would have been returning to a workplace atmosphere of hostility, embarrassment, or humiliation. Therefore, Hooge failed to mitigate his damages when he refused the offer to return to work, although his employment would not have continued past the point when Gillwood locked out its union workers and ceased operations. Hooge was awarded nine months' reasonable notice.

*Hooge v. Gillwood Remanufacturing Inc.*, 2014 CLLC ¶210-017

## The Saskatchewan Labour Relations Board had the Authority To Make a Remedial Order Waiving Time Limits Contained in the Collective Agreement

Court of Appeal for Saskatchewan, December 10, 2013

Read was a probationary employee working as a bus driver and was a member of the Amalgamated Transit Union (the "union"). He arrived late for work, and his supervisor noticed his eyes were glassy and he smelled of alcohol. Read was sent home, and was subsequently terminated. The union brought a grievance, and was unsuccessful at each step of the internal procedure. The union conducted two internal votes in favour of taking the grievance to arbitration, although this was delayed in order to invite Read to address the union. At the meeting, a motion before the union membership to rescind the earlier motion to send the grievance to arbitration was passed. Read brought a duty of fair representation complaint against the union. The Labour Relations Board allowed the complaint, and referred the grievance to arbitration. The collective agreement stated that a grievance must be sent to arbitration within 45 days, but this time limit was waived by the Board. The Board dismissed an application by the City of Saskatoon to reconsider its decision. An application for judicial review was dismissed. The City appealed.

The appeal was dismissed. The Board's decision to refer the grievance to arbitration and waive the time limits contained in the collective agreement was necessary, since otherwise the employee would not have a remedy available. Subsection 5(*e*)(ii) of *The Trade Union Act* required "any person" to do "any thing for the purpose of rectifying a violation of this Act". This section was sufficiently broad to include an employer in the position of the City, and the

type of order made by the Board in this case. While a damage award against the union may have been available to the Board instead, it would have required a full hearing to determine whether Read had been dismissed for cause. A damage award was not the only remedy available. The grievance was referred to arbitration by the Board to remedy a breach of the Act, not pursuant to the collective agreement. Therefore, the Chambers judge correctly found the Board had the jurisdiction to make the order it did. However, the Board's order was changed such that the time limitations within the collective agreement were waived only to the extent that they were not met as a result of the union's breach.

*Saskatoon (City) v. Amalgamated Transit Union, Local 615*, 2014 CLLC ¶220-013

## Worker's Request for Reimbursement of Marihuana for Pain Denied

Supreme Court of British Columbia, January 30, 2014

Johnson sought judicial review of a decision of the Workers' Compensation Appeal Tribunal ("WCAT") denying his request for reimbursement for the cost of marihuana. Johnson used marihuana for pain. He injured his hand at work in 1978, and two fingers were amputated. In January 2013, Johnson sought reimbursement from the Workers' Compensation Board ("WCB") for various marihuana products. The WCB requested a medical opinion from a physician retained by the WCB as to whether the WCB could approve a claim for marihuana products. The physician determined that Johnson did not have a prescription for marihuana from a licenced physician, and that regardless, the WCB has a practice of rejecting all requests for coverage of marihuana products based upon a recommendation of the Evidence Based Practice Group ("EBPG"). The EBPG is a group to whom the WCB delegated responsibility to research the evidence surrounding medical issues such as the use of marihuana for pain reduction. In 2003 and 2006, the EBPG concluded there was insufficient evidence to support the use of marihuana as a prescribable drug. Based on this practice, the WCB denied Johnson's request. Johnson appealed the denial to the WCAT. The WCAT denied Johnson's appeal. The WCAT noted that pursuant to section 21(1) of the *Workers' Compensation Act*, the WCB has discretion to approve or disapprove payment for medical benefits such as prescription medications. The WCAT also noted that Johnson had not submitted any medical evidence that was contrary to the recommendation of the EBPG. As such, the WCAT found the WCB's decision to deny Johnson's claim was a reasonable exercise of the WCB's discretion.

The application was denied. The WCAT properly decided the appeal on the only medical evidence that was before it. Johnson did not produce any medical evidence to support a conclusion contrary to that reached by the EBPG. To date, the EBPG has not found sufficient evidence to support a conclusion that marihuana could properly be prescribed for pain. There was no evidence that this conclusion was unreasonable or that the WCAT acted unreasonably in relying upon that conclusion.

*Johnson v. Cassiar Packing Company Ltd.*, 2014 CSHG ¶95,947

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