Labour Notes®

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ALBERTA'S *PERSONAL INFORMATION PROTECTION ACT* VIOLATES CHARTER

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The Supreme Court of Canada has just held that the collective right to freedom of expression in a lawful strike situation trumps an individual's right to control their information in a public setting, striking down the Alberta *Personal Information Protection Act* (PIPA).

In its decision, *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, the Supreme Court weighed the collective rights of a union's freedom of expression under the *Canadian Charter of Rights and Freedoms* ("Charter") against the rights of individuals whose personal information was collected, used and disclosed without consent by the union. The Supreme Court found that Alberta's *Personal Information Protection Act* (PIPA) violates s. 2(*b*) of the Charter (the right to right to freedom of expression) because its impact on freedom of expression in the labour context is disproportionate and the infringement is not justified under s. 1 (the Charter provision which permits a reasonable limit to be imposed upon a Charter right if justifiable in a free and democratic society).

During a union's lawful picketing activity the union photographed individuals crossing the picket line. Some of those photos were used in posters and leaflets. Responding to complaints by those whose information was collected and used without consent, the Office of the Information and Privacy Commissioner appointed an adjudicator who found that the union's efforts were for an expressive purpose and that "one of the primary purposes of the Union's information collection was to dissuade people from crossing the picket line" and rejected the union's claim that the collection, use and disclosure came within the journalistic purposes exemption under PIPA. The union was ordered to stop collecting the personal information for any purposes other than a possible investigation or legal proceeding and to destroy any personal information it had

in its possession that had been obtained in contravention of PIPA.

The union sought judicial review claiming that the provisions of PIPA that prevent it from collecting, using and disclosing personal information obtained from its lawful picket line infringed s. 2(*b*) of the Charter. The chambers judge found a breach of the Charter right which was not justified under s. 1 of the Charter. The Alberta Court of Appeal was of the view that the real issue in the case was whether it was justifiable to restrain expression in support of labour relations and collective bargaining activities and concluded that PIPA was overbroad and granted the union a constitutional exemption from the application of PIPA.

The Office of the Information and Privacy Commissioner appealed to the Supreme Court. The issues were whether the restriction of a union's right to collect, use and disclose personal information during a lawful strike violates s. 2(*b*) of the Charter and, if so, if such breach was saved by s. 1.

The unanimous Court recognized a pressing and substantial objective behind PIPA, namely to:

> . . . govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

The Supreme Court recognized that providing an individual with some measure of control over his or her personal information is intimately connected to their individual autonomy, dignity and privacy and that these are fundamental values that lie at the heart of a democracy.

Noting the broad restrictions under PIPA the Supreme Court found that "these broad restrictions are not justified because they are disproportionate to the benefits the legislation seeks to promote". Context is everything and to the Supreme Court it was important that those crossing the picket line were doing so in a location where that was readily and publicly observable. As well the information collected, used and disclosed by the union was limited:

> . . . the personal information collected, used and disclosed by the Union was limited to images of individuals crossing a picket line and did not include intimate biographical details. No intimate details of the lifestyle or personal choices of the individuals were revealed.

The Supreme Court found that PIPA ". . . limits the collection, use and disclosure of personal information other than with consent without regard for the nature of the personal information, the purpose for which it is collected, used or disclosed, and the situational context for that information". This was too high a price and disproportionate to the acknowledged benefits of the legislation.

Recognizing that an individual appearing in public does retain an interest in controlling her or his information, the Supreme Court found that in the context of the picket line the restrictions of PIPA were to "impede the formulation and expression of views on matters of significant public interest and importance".

The Supreme Court had previously recognized the fundamental importance of freedom of expression in the context of labour disputes and that "it is often the weight of public opinion which will determine the outcome of the dispute". In such cases economic and political pressure are permitted as long as it does not rise to the level of a tortious or criminal act.

The Supreme Court did not give the union carte blanche and examined the specific expressive activity noting that "like privacy, freedom of expression is not an absolute value and both the nature of the privacy interests implicated and the nature of the expression must be considered in striking an appropriate balance". Unfortunately the Supreme Court did not give any guidance as to what expressive activity might cross the line such that the freedom of expression had gone too far. In the specific context the Supreme Court had noted that no intimate details of the lifestyle or personal choices of the individuals had been disclosed.

In the end result, the whole of PIPA was declared invalid. This declaration was however suspended for a period of 12 months to give the legislature time to decide how best to make the legislation constitutional. The Supreme Court did not sustain the constitutional exemption ordered by the Court of Appeal and instead merely quashed the Adjudicator's order.

The impact of this decision will require Alberta to consider the scope of the exemptions under its private sector privacy law. Of interest will be to see if the freedom of expression right under the constitution is considered for all players or merely in the labour relations context. As well British Columbia and Manitoba, which have similarly modeled laws, may also consider such an exercise.

Q & A

What is Call-In Pay?

Call-in pay is the minimum payment that employees are entitled to if they are called in to or report to work but are not given the opportunity to work an entire shift or normal workday. Essentially, call-in pay protects workers from being called in to work at the employers' discretion and then being sent home with no remuneration.

POST-ACCIDENT SAFETY FIXES: AN ADMISSION OF LIABILITY?

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

We are often asked whether post-accident fixes or improvements by an employer will be held against it if occupational health and safety charges are laid. For example, if an employer puts a guard on a machine after an employee was injured on the machine, will the court see the installation of the guard as an admission that the machine was not properly guarded?

Employers sometimes feel that they are caught between implementing the fix and risking having it be seen as an admission of liability, or not implementing the fix and risking a higher fine if convicted or being charged with violating a government order to fix the machine. Of course, most employers will be motivated to do what is right and install a fix if needed for safety reasons, regardless of whether that increases the risk of charges or fines; however, the possible risks should be considered. In some cases, quick implementation of the safety fix could actually help *avoid* charges.

It appears from the caselaw that post-accident safety fixes will, generally, not be considered an admission that an employer violated a safety rule, but may be considered by a court in determining whether the employer exercised *due diligence* (took all reasonable steps to prevent the violation) or had knowledge of the hazard. For example, the installation of a guard after an accident will likely not be an admission that a guard should have been in place, but it will be relevant to whether the employer, before the accident, took all reasonable steps to ensure that the machine was properly guarded.

In the recent case of *R. v. Reliable Wood Shavings Inc.*, 2013 ONCJ 518, the court stated, "I believe that I can look at post accident conduct in assessing what was reasonable in all of the circumstances . . . What I cannot do is treat them as an admission of liability."

On the plus-side, post-accident fixes will often lead to lower fines if a company is convicted of a safety offence, as the court will see the employer's proactive safety fix as a sign of the employer's commitment to safety. The cost of the fix will often also be considered by the court in setting the amount of the fine.

In one case, the Ontario Food Terminal Board made changes and modifications to the roadways within its facility, including the installation of several stop signs, concrete barriers, and signs around the area where the accident had occurred, after a workplace accident that eventually led to the worker's death. While the OFTB was convicted of safety offences and fined $65,000, the Justice of the Peace did not view the post-accident actions as admissions of guilt or negligence. The court held that subsequent improvements by a defendant are *not* a basis for a finding of liability for safety offences, but will be considered in determining whether the employer exercised due diligence or had prior knowledge of the hazard.

An employer should consider, when faced with an accident, how post-accident fixes or improvements could be viewed by the court if the employer is charged. The question is usually not whether to implement the fix, but how to do it in a way that maximizes safety while minimizing legal risk. Advice from an occupational health and safety lawyer should be obtained, and if possible the work should be documented in a manner that confirms that it is not an admission of liability.

PROGRESS OF LEGISLATION

New Manitoba Privacy Legislation Given Royal Assent

The Personal Information Protection and Identity Theft Prevention Act, SM 2013, c. 17, ("PIPITPA") has been given Royal Assent. It will come into force on proclamation. According to PIPITPA:

> The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

Some of PIPITPA's more important provisions, particularly those related to employment, are discussed below.

When it comes into force, PIPITPA will apply to "every organization and in respect of all personal information", including corporations, unions, partnerships, and individuals "acting in a commercial capacity", though there are a number of exceptions. In discharging their responsibilities under PIPITPA, organizations will be required to act reasonably.

Organizations subject to PIPITPA will be required to designate one or more persons charged with ensuring compliance. Furthermore, they will be required to establish policies and practices that enable the organization to meet its obligations under the Act.

PIPITPA sets out requirements regarding consent for the collection, use, and disclosure of personal information about an individual, as well as limits on the purposes for which such information may be collected, used, and disclosed. Additionally, it sets out a number of instances in which collection, use, and disclosure of personal information about an individual is acceptable without that individual's consent. There are rules regarding the collection, use, and disclosure of "personal employee information" in circumstances where an individual is employed by the organization or where the information being collected, used, or disclosed "is for the purpose of recruiting a potential employee". In order to collect, use, or disclose personal employee information without consent:

- the collection, use, or disclosure of the information must be reasonable for the purposes for which it is being collected, used, or disclosed;
- the information must be restricted to information related to the individual's employment (or volunteer work relationship); and
- where the individual whose information is being collected, used, or disclosed is an employee of the organization, the organization must have given the individual prior reasonable notice that the information would be collected, used, or disclosed and of the purposes for which the information would be collected, used, or disclosed.

Organizations will be allowed to disclose personal employee information about an individual without consent if it is being disclosed to an organization that is seeking information about an employee or for recruitment purposes related to a potential employee.

Organizations will be required to make reasonable efforts with respect to ensuring the accuracy and completeness of any personal information that they collect, use, or disclose. Additionally, organizations will be required to make "reasonable security arrangements against risks such as unauthorized access, collection, use, disclosure, copying, modification, disposal or destruction." Where personal information about an individual in an organization's custody or control is improperly accessed, stolen, or lost, the organization will be required to notify the individual as soon as is reasonably practicable (subject to certain exceptions).

Employees of organizations will be protected from retribution in certain situations, such as where they, "acting in good faith and on the basis of reasonable belief":

- disclose to the Ombudsman that the organization (or any other person) has contravened PIPITPA, or is about to do so;
- do, or state an intention to do, anything that must be done to avoid contraventions of PIPITPA; or
- refuse to do anything that contravenes PIPITPA.

Offences under PIPITPA will be punishable, on summary conviction, by a fine of up to $10,000 for an individual, and of up to $100,000 for a person that is not an individual.

PIPITPA was introduced as a Private Member's Bill. It received first reading on May 28, 2013, second reading on September 3, third reading on September 12, and Royal Assent on September 13.

Newfoundland and Labrador Bill Would Create New Unpaid Leaves of Absence

Bill 17, *An Act to Amend the Labour Standards Act*, would, if passed, create two new unpaid leaves of absence: crime-related child death or disappearance leave and critically ill child care leave.

Critically ill child care leave of up to 37 weeks would be available to employees where a physician has issued a certificate stating that the employee's child is critically ill and requires care or support. A "critically ill child" is defined as a person who is under 18 years of age on the day on which the leave begins, whose baseline state of health has significantly changed, and whose life is at risk as a result of an illness or injury.

Crime-related child death or disappearance leave of up to 52 weeks would available to employees whose child (under 18 years of age) has disappeared as the probable result of a crime. Where a child has died as the probable result of a crime, up to 104 weeks of leave would be available. Employees charged with the crime would not be eligible for this leave.

To qualify for these leaves, the employee must have been employed for at least 30 days and he or she must be:

- a parent of the child;
- the spouse or cohabiting partner of a parent of the child;
- a person with whom the child has been placed for the purposes of adoption;
- a foster parent of the child; or
- a person who has the care or custody of the child and is considered to be like a close relative, whether or not the person is actually related to the child.

An employee who intends to take either of these leaves must provide written notice to his or her employer at least two weeks before the leave is to begin, unless there is a valid reason why that notice cannot be given.

If passed, Newfoundland and Labrador will become the sixth jurisdiction to provide for critically ill child care leave and crime-related child death or disappearance leave. Similar leaves are now in force in the federal jurisdiction, Manitoba, Nova Scotia, Quebec, and Yukon.

Bill 17 received first reading on November 19, 2013.

Newfoundland and Labrador and Prince Edward Island Bills Would Protect Gender Identity and Gender Expression Under Their Human Rights Legislation

In Newfoundland and Labrador, Bill 25, *An Act to Amend the Human Rights Act, 2010*, was introduced on November 19, 2013. If passed, it would include gender identity and gender expression as prohibited grounds of discrimination under the *Human Rights Act, 2010*.

In Prince Edward Island, Bill 11, *An Act to Amend the Human Rights Act*, was introduced on November 13, 2013. If passed, the Bill would include gender identity and gender expression as prohibited grounds of discrimination in the *Human Rights Act*.

Currently, gender identity is expressly protected in human rights legislation in Manitoba, Northwest Territories, Nova Scotia, and Ontario. Gender expression is expressly protected in Nova Scotia and Ontario.

Quebec Bill Would Enact State Secularism Charter and Amend *Charter of Human Rights*

Bill 60, the *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, was introduced on November 7, 2013. Bill 60 would, if passed, enact a Charter that is intended, among other things, to promote secularism of the State. To this end, the new Charter would provide that:

> In the pursuit of its mission, a public body must remain neutral in religious matters and reflect the secular nature of the State, while making allowance, if applicable, for the emblematic and toponymic elements of Québec's cultural heritage that testify to its history.

Bill 60 would require that, while exercising their functions, "personnel members of public bodies" ("PMPBs") maintain religious neutrality and that they "exercise reserve with regard to expressing their religious beliefs."

Among the more unique features of Bill 60 is the requirement that, while exercising their functions, PMPBs would be prohibited from wearing religious symbols (including headgear, jewellery, clothing, etc.) "which, by their conspicuous nature, overtly indicate a religious affiliation." Furthermore, PMPBs would be obliged to exercise their functions with their faces uncovered (although there would be an exception for instances where face coverings are required due to working conditions or occupational requirements). Similarly, persons receiving services from PMPBs would ordinarily have to have their faces uncovered. Accommodations to this requirement would not be permitted where there are "security or identification reasons or because of the level of communication required."

In addition to PMPBs, these requirements would also apply to a variety of other public positions in the exercise of their functions, including labour arbitrators who appear on a list made by the Minister of Labour under the *Labour Code*, judges of the Court of Québec, and judges of the Human Rights Tribunal.

Bill 60 specifies that the duty of neutrality and reserve, the restriction on wearing religious symbols, and the requirement to have one's face uncovered "constitute an integral part of the employment conditions of the persons to whom they apply" and that a contractual provision to the contrary would be without effect. Additionally, where a PMPB first fails to comply with the prohibition on wearing religious symbols, public bodies would be required to engage in a dialogue before any disciplinary measures are taken.

Bill 60 goes on to set out a number of factors that would have to be considered by public bodies when assessing requests for accommodation on religious grounds.

Bill 60 would require public bodies to adopt an implementation policy and sets out a number of requirements with regard to such policy. At least once every five years, implementation policies would have to be reviewed.

Additionally, Bill 60 would, if passed, amend the *Charter of human rights and freedoms* (the "Quebec Charter") in certain ways. Among the proposed amendments, a statement about the "equality between women and men and the primacy of the French language as well as the separation of religions and State and the religious neutrality and secular nature of the State" being fundamental values would be added to the preamble of the Quebec Charter. Additionally, a definition of accommodation would be added, as would certain considerations to be assessed when a request for accommodation is made. Rules regarding accommodations applicable to "State bodies" dealing with the separation of State and religion would also be included.

Bill 60 would come into force on assent; however, a number of transitional provisions and limited extension periods would apply which would delay full application.

NO EVIDENCE, NO DICE: DRUG ADDICTION SELF-ASSESSMENT NOT ENOUGH

— By Daniel Mayer. © Heenan Blaikie LLP.

Terminating a unionized employee for substance abuse in the workplace is tricky, considering the duty to accommodate and the traditional mitigating factors arbitrators will consider when determining whether termination is an appropriate response (length of employment, discipline record, remorse, etc).

A recent arbitration decision might bring some comfort to employers. In *Vale (Manitoba Operations) v. United Steel Workers (Fudge Grievance)*, [2013] MGAD No. 11, an arbitrator dismissed an employee's grievance after he was terminated for possession and use of marijuana in the workplace. There was insufficient evidence to show that the grievor suffered from a drug addiction.

The grievor worked in a mine refinery. The parties agreed that the overall operation of the employer was a safety sensitive workplace.

The grievor attempted to convince the arbitrator that he suffered from a drug addiction and that the employer should have accommodated him. The grievor described a pattern of marijuana abuse, testifying that he had been a heavy user of marijuana since the age of 15. At the time of termination, he was 24 years old.

As described by the arbitrator, the grievor's testimony was uncorroborated subjective evidence of heavy drug use as part of a dysfunctional personal life. Irresponsible drug use, without more, does not prove that someone suffers from an addiction, reminded the arbitrator.

While an arbitrator can consider a grievor's self-assessment, here the grievor's credibility was diminished because he was not forthcoming during the investigation. He had originally claimed that he smoked marijuana occasionally at work, but later admitted to smoking three to four times per week.

Moreover, the grievor's claim that he received a diagnosis from the Addictions Foundation of Manitoba was insufficient because he failed to produce any report confirming the diagnosis. An adverse inference could be drawn for failing to produce such a document.

In the end, short of any evidence that the grievor suffered from an addiction, the arbitrator was left with the available mitigation factors, but in this case none were sufficient to justify a lower penalty.

This decision is a reminder that uncorroborated personal claims of drug abuse are often insufficient, whether during arbitration proceedings or for the purposes of accommodation.

RECENT CASES

Executive Whose Contract Was Not Renewed and Who Was Told That He Need Not Work the Final Month of His Contract Was Constructively Dismissed

Court of Queen's Bench of Alberta, July 2, 2013

Thompson was hired by Cardel Homes ("Cardel") as regional president. The initial contract was for two years and it provided for a year's salary for failure to renew or termination without cause. After two years, the parties entered into a new written agreement for 13 months which provided that Cardel could terminate Thompson without cause by paying any remaining salary, plus one year's salary, earned but unpaid shares, and outstanding vacation pay. One month prior to the end of the contract, Thompson was informed that his contract would not be renewed and that he was not required to work for the remainder of the contract. He was provided with his remaining salary, along with accrued vacation and full profit shares earned. Thompson brought a wrongful dismissal action, claiming that he had been terminated and was entitled to one year's salary.

The action was allowed. In determining whether there was a repudiation of Thompson's employment contract by Cardel, a reasonable person in Thompson's position would have felt that an essential term of the employment contract

was being substantially changed when he was relieved of his duties one month prior to the end of his contract, asked to return his keys and passwords, and asked to leave the building. Therefore, Thompson was constructively dismissed and was terminated without cause. He was awarded damages as set out in the agreement, namely 12 months' base salary.

Thompson v. Cardel Homes Limited Partnership, 2013 CLLC ¶210-050

Constructive Dismissal Judgment Which Found That an Employee Was Subject to Racism and a Poisoned Work Environment Was Set Aside

Ontario Court of Appeal, July 31, 2013

Johnson, a black man, worked for eight years as a production supervisor at a General Motors ("GM") assembly plant. He was responsible for training group leaders on a new system of policies and guidelines. Markov, a group leader in the body shop, failed to attend his training session with Johnson. Markov claimed he was uncomfortable with Johnson as a result of an earlier incident where he believed Johnson laughed at an insensitive comment made by another employee about Markov. Johnson believed that Markov refused to train with him because Johnson was a black man. GM investigated and found no racially-motivated conduct by Markov. Since Markov refused to take the training, Markov removed himself from group leader duties. When Markov was found to be performing group leader duties, he was suspended for five days. After an appeal under the collective agreement, the suspension was rescinded, since Markov was found to have been simply filling in for the actual group leader who was absent. Johnson asked for another investigation by GM, which found no wrongdoing. Johnson took a medical leave of absence for two years, and when he refused offered alternate work assignments, GM determined Johnson was resigning. Johnson brought a wrongful dismissal action, claiming he was constructively dismissed. The trial judge upheld Johnson's claim, finding that he was subject to racism and a poisoned work environment. GM appealed.

The appeal was allowed. The finding of racism by the trial judge with respect to Markov's refusal to take training with Johnson was unsupportable and unreasonable. There was no direct evidence of racism toward Johnson by anyone at GM. The trial judge's finding that GM's body shop was a poisoned work environment due to racism was also unreasonable. One employee's refusal to attend training fell well short of the type of egregious behaviour resulting in a poisoned work environment. Johnson was satisfied when Markov stepped down as group leader and was disciplined. He only reasserted his claim of racism when Markov's suspension was rescinded on appeal under the collective agreement. GM did not repudiate its employment contract with Johnson or act unreasonably in treating Johnson's decision not to return to work as a voluntary resignation of employment. Johnson was offered two employment opportunities outside the assembly plant body shop, which he declined, and he failed to provide current medical evidence to support his claim of continuing disability.

General Motors of Canada Limited v. Johnson, 2013 CLLC ¶210-051

Nullification of Arbitrated Wage Increase Was Not an Impermissible Interference with the Bargaining Process

British Columbia Court of Appeal, August 19, 2013

The Federal Government Dockyard Trades and Labour Council (the "Council") was the bargaining agent for employees of the Treasury Board in naval dockyards on the coast of British Columbia. The Treasury Board and the Council were unable to agree on a new collective agreement, and the matter was referred to arbitration. During this time, the international financial crisis occurred, and the Treasury Board informed the Council that legislation might be introduced that would include caps on increases to wage rates. The arbitration board issued an award granting a 5.2 per cent wage increase for 2006. It also provided for wage increases from 2006 through 2009, which were within the limits subsequently enacted by the *Expenditure Restraint Act*. After the arbitration board's decision was issued, the *Expenditure Restraint Act* came into force, which restricted compensation increases, starting with the 2006-7 fiscal year and had the effect of nullifying the 5.2 per cent wage increase awarded by the arbitration board. The Council brought an action, claiming this was an impermissible infringement on its freedom of association. The trial judge dismissed the action. The trial judge found no violation of the freedom of association, since the wage increase was not a term of the collective

agreement resulting from collective bargaining; rather, it was imposed through binding arbitration. Alternately, the government's efforts to negotiate fulfilled its obligation to consult and bargain in good faith. The Council appealed.

The appeal was dismissed. The trial judge erred in taking a narrow view of collective bargaining. There was no distinction between a collective agreement achieved by arbitration and one achieved solely by collective bargaining. The trial judge also erred in determining the effect of the legislation on the collective bargaining process. The legislation cancelled one wage increase and set wage increase rates for five years, although there was no restriction on bargaining after that time. The wage increase at issue here, which was cancelled, was not so essential to the structure of the collective agreement that its nullification was an impermissible interference with the freedom of association.

Federal Government Dockyard Trades and Labour Council v. Canada (AG), 2013 CLLC ¶220-056

CIRB Lacks Constitutional Jurisdiction to Grant Certification Application Related to Postal Outlets in Drug Stores

Canada Industrial Relations Board, July 3, 2013

Canada Post Corporation ("Canada Post") entered into a program with Shoppers Drug Mart to introduce postal outlet dealers into drug store franchises. The Canadian Union of Postal Workers (the "union") brought an application for certification to represent employees working at the postal outlets located in various Pharmaprix, Shoppers Drug Mart Inc. franchises (the "franchisees") located within certain geographic areas. All of the relevant franchisees were authorized to operate postal outlets in their stores. The union argued that the operations of the postal outlets in the franchisees were under exclusive federal jurisdiction as a "postal service"; therefore, labour relations were governed by federal jurisdiction. Canada Post, Pharmaprix, and the franchisees believed that the Canada Industrial Relations Board did not have constitutional jurisdiction to rule on the union's certification applications, since the postal outlet operations were not a "postal service", and even if they were, the franchisees were provincially regulated businesses.

The Board did not have constitutional jurisdiction to rule on the certification application. While the operation of the franchisees' postal outlets may not have constituted "postal service", since they did not carry out all of the collection, transmission, and delivery operations of Canada Post, the postal outlets were an integral part of Canada Post's postal service. There was a tangible connection between the franchisees and Canada Post, allowing the operation of postal outlets in the drug stores. All franchisees were required to sign a "recognition agreement" and were required to follow Canada Post guidelines for the set-up of the postal outlets. This included using the Canada Post colours and logo, the equipment and products offered, along with adhering to Canada Post quality, service, and advertising standards, which were all supplied and controlled by Canada Post. The franchisees were the true employers of the employees at issue, and had fundamental control over the overall working conditions of the postal outlet employees. The franchisees were in charge of staffing, training, performance evaluation, supervision, clothing, and possible termination. The franchisees' essential operations were the practice of pharmacy and retail sales, which were provincially regulated. The postal outlet services did not form an exclusive or principal part of drug store operations, accounted for only a small percentage of the franchisees' revenues, and could not be subject to federal jurisdiction. The postal outlet operations were not a functionally discrete unit that could be constitutionally characterized separately from the rest of the franchisees' operations, since the postal outlet employees worked inside the drug stores, and the postal outlet employees were fully integrated with other drug store employees.

Canadian Union of Postal Workers v. Canada Post Corporation, 2013 CLLC ¶220-057

Decision That Employer's Actions Were Within Management Rights Rather Than Direct Bargaining Was Reasonable

Court of Appeal for Saskatchewan, August 16, 2013

Employees at the Potash Corporation of Saskatchewan's ("Potash") Cory Mine were paid for their annual vacation at the start of the year and were not paid while actually on vacation. The Cory Mine employees were on strike from August 7, 2008 to November 13, 2008, which reduced the time available to take vacation during the 2008-2009 vacation year by approximately three months. The United Steelworkers (the "union") and Potash met about the possibility of allowing employees to waive part or all of their remaining vacation time for the 2008-2009 vacation year,

which was opposed by most employees. On February 12, 2009, Potash announced layoffs would occur from March 22, 2009 to May 16, 2009, which further reduced time available to take vacation by approximately six weeks. Potash decided to allow employees to waive their vacation time by continuing to work for pay, and approximately 20 employees chose to do so. The union filed an unfair labour practice complaint, claiming Potash failed to bargain collectively. The Labour Relations Board dismissed the union's application and an application for judicial review was dismissed. The union appealed.

The appeal was dismissed. At issue was whether the Board's decision was unreasonable because it looked at whether there was an obligation to bargain mid-term, rather than determining whether Potash's actions constituted direct bargaining. This argument assumed that "direct bargaining" was a legal concept that was capable of precise definition, when it depended on the individual circumstances. The Board did not overlook whether the actions of Potash amounted to direct bargaining or ignore prior jurisprudence. The Board determined that the employer's actions fell within management rights, and the decision was reasonable.

United Steelworkers, Local 7458 v. Potash Corp. of Saskatchewan, 2013 CLLC ¶220-058

Candidate's Inability To Attend Work on Saturdays Due to Her Faith Was a Factor in Employer's Failure To Consider Her Employment Application

Human Rights Tribunal of Ontario, August 9, 2013

Widdis applied for a position as a new business clerk with Desjardins Group ("Desjardins"). Widdis was contacted for a telephone pre-screen interview. She was asked during the interview if she could work rotating Saturdays, to which she replied that she was unable to work on Saturdays since she was a 7th day Adventist and was required to attend church. Widdis was not one of the applicants chosen for an in-person interview. She brought a human rights complaint alleging discrimination on the basis of creed.

The complaint was allowed. There was no evidence that Desjardins was asking whether Widdis was able to work on Saturdays in order to classify her, either directly or indirectly, by her creed. Questions about availability to work were legitimate questions that did not seek to identify applicants by a prohibited ground of discrimination. It was Widdis's sincerely held religious belief that she could not work on Saturdays and that she must attend church. The call centre operated on Saturdays and some employees were required to work on that day, which made the ability to work on Saturday on a rotational basis a requirement, qualification, or factor which was not discriminatory, although it resulted in the exclusion of Widdis on the basis of her creed. Widdis's inability to work on Saturdays was a factor in the decision that she not advance past the telephone screening phase of the recruitment process. The only available evidence for determining which applicants would continue on to the next interview stage was the information contained on the pre-screening sheet. Therefore, creed was a factor in Desjardins's decision to refuse to consider Widdis's application for employment. She was awarded $4,000 for the infringement of the *Human Rights Code* and for injury to her dignity, feelings, and self-respect.

Widdis v. Desjardins Group, 2013 CLLC ¶230-040

Workplace Safety and Insurance Board's Return to Work Meeting Was Not a "Proceeding" and Did Not Appropriately Deal with the Substance of the Human Rights Complaint

Human Rights Tribunal of Ontario, August 30, 2013

Maxwell worked as a labourer for Cooper-Standard Automotive Canada Ltd. ("Cooper-Standard"). He injured his left elbow at work, and claimed benefits from the Workplace Safety and Insurance Board ("WSIB"). Maxwell was accommodated and continued to work for Cooper-Standard. Maxwell became concerned that Cooper-Standard was giving him work beyond his physical capabilities and restrictions, and was concerned that they were looking to fire him. The WSIB's return to work specialist attended a meeting with Maxwell and management, in order to determine if there was a job that could be suitable for Maxwell. No such position was identified. As a result, Cooper-Standard wrote a letter stating it was unable to accommodate Maxwell, it had no suitable work, and he would be incurring a wage loss. The WSIB created a work transition plan for Maxwell and he was eligible for loss of earning benefits during his

retraining to be an electrical technician. Maxwell brought a human rights complaint alleging discrimination on the basis of disability, since Cooper-Standard stopped accommodating his workplace injury rather than continuing to offer him modified work. Cooper-Standard brought a preliminary motion for dismissal, claiming that the subject matter of the application had already been dealt with by the WSIB.

The preliminary motion to dismiss was dismissed. The Tribunal found that the WSIB process by which Maxwell was deemed eligible for work transition was not a "proceeding" within the context of section 45.1 of the *Human Rights Code* (the "Code"). The work transition specialist accepted Cooper-Standard's representation that there was no suitable work available for Maxwell and asked it to prepare a letter for the WSIB stating this conclusion. Maxwell was not given the opportunity to dispute the position of Cooper-Standard. While this was sufficient to dispose of Cooper-Standard's request to dismiss, the Tribunal went on to find that the substance of the application was not "appropriately dealt with" by the WSIB. The WSIB accepted Cooper-Standard's determination that it was unable to provide suitable and safe modified work, and did not determine whether Maxwell was incapable of fulfilling the essential duties within the meaning of the Code. It would be unfair to Maxwell to prevent him from pursuing his human rights claim due to the outcome of the return to work meeting, since he did not have the opportunity to know the case against him, the WSIB relied heavily on Cooper-Standard's representation, and there was no opportunity for Maxwell to challenge or appeal the determination.

Maxwell v. Cooper-Standard Automotive Canada Limited, 2013 CLLC ¶230-041

DID YOU KNOW . . .

. . . That Social Justice Tribunals Ontario is Seeking Feedback on a Draft French Language Services Policy?

Social Justice Tribunals Ontario ("SJTO"), a cluster of administrative tribunals that includes the Human Rights Tribunal of Ontario, intends to introduce a French Language Services policy by the end of 2013. To that end, SJTO has created a draft version of its policy and is seeking feedback.

More information may be found at: http://www.sjto.gov.on.ca/english/Resources/Consultation/index.htm.

Written feedback may be submitted by December 6, 2013 to:

SJTO Consultations

40 Dundas Street West, 4th Floor

Toronto, Ontario

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Fax: 416-212-8024

Email: sjtoinfo@ontario.ca

ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT, 2005 REMINDER

The *Integrated Accessibility Standards* (the "Regulation"), under the *Accessibility for Ontarians with Disabilities Act, 2005*, requires that by January 1, 2014, all "small designated public sector organizations" and "large organizations" (obligated organizations that have 50 or more employees), are required to prepare and implement accessibility policies and multi-year accessibility plans. Accessibility policies are to set out the manner in which the organization has or will achieve accessibility in accordance with the Regulation. These organizations are to "include a statement of organizational commitment to meet the accessibility needs of persons with disabilities in a timely manner in their policies." Multi-year accessibility plans are to set out the organization's approach to the prevention and removal of barriers, as well as the manner in which the organization will meet the obligations set out in the Regulation. Multi-year accessibility plans are to be updated, at minimum, once every five years. Certain governmental and public sector organizations have additional requirements in relation to the multi-year accessibility plans, such as the obligation to consult persons with disabilities when creating and updating their plans, and the obligation to prepare annual status reports. Documents describing the accessibility policies are to be publicly available, and are to be provided in an accessible format if requested. Plans (and status reports, where necessary) must also be provided in an accessible format upon request and are to be posted on an organization's website, if it has one.

"Small organizations" (those with fewer than 50 employees) will be required to prepare and implement accessibility policies by January 1, 2015. They are not included in the requirement to prepare and post multi-year accessibility plans.

Depending on an organization's size and type, there are a variety of other obligations set out in the Regulation that must be met by January 1, 2014. For instance, certain training requirements and many of the requirements contained in the Employment Standards portion of the Regulation will become applicable to "large designated public sector organizations". For more information about the Employment Standards requirements, see Part III of the Regulation and the commentary on the *Integrated Accessibility Standards* at ¶7341 of the *Canadian Labour Law Reporter*.

LABOUR NOTES

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Notice: *This material does not constitute legal advice. Readers are urged to consult their professional advisers prior to acting on the basis of material in this newsletter.*

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