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Supreme Court bars random alcohol testing by employers in the absence of reasonable cause

by Martin J. Thompson, Robert Boyd and Timothy Cullen, summer student

Case Brief: Communications, *Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34.

The ongoing efforts by Canadian employers to engage in random drug and alcohol testing suffered a further setback as a result of a decision released on June 14, 2013. In a 6-3 split, the Supreme Court of Canada has upheld a New Brunswick labour arbitration board decision that struck down a random alcohol testing policy at a mill owned by Irving Pulp and Paper Ltd. Although the facts in this case involved a unionized workplace, the implications of this decision may be far-reaching and impact all types of employment settings.

background

In 2006, Irving unilaterally adopted a "*Policy on Alcohol and Other Drug Use*" at one of its paper mills in Saint John, New Brunswick. Under the policy, 10% of employees deemed to be in "safety sensitive" positions would be randomly selected for unannounced breathalyser testing over the course of a year. Testing positive for alcohol or refusing to take the test could lead to disciplinary action, including, in certain cases, dismissal.

The Communications, Energy and Paperworkers Union filed a grievance on behalf of an employee who was tested under the policy. While the employee's breathalyser test revealed a blood alcohol level of zero, the union only challenged the random alcohol testing component of the policy.

reasons of the majority

In finding that the labour arbitration board's decision was reasonable, the Supreme Court of Canada identified the central legal issue in this case as being whether Irving's "policy was a valid exercise of the employer's management rights under the collective agreement." Writing for the majority, Abella J. relied upon the body of arbitral jurisprudence that has developed a "balancing of interests" proportionality approach, under which unilateral imposed testing in a dangerous workplace has generally been rejected unless the employer is aware of a drug or alcohol abuse problem in the workplace

The majority agreed with the board that Irving had no evidence of enhanced safety risks posed by alcohol use that would justify random testing. There had only been eight incidents involving alcohol over a 15-year period. Furthermore, the board had determined that Irving's safety gains under the policy ranged "'from uncertain... to minimal at best', while the impact on employee privacy was found to be much more severe". In light of these findings, Irving's policy was held to be an unreasonable exercise of management rights under the collective agreement.

reasons of the dissent

At the heart of the dissenting opinion written by Rothstein and Moldaver JJ., with McLachlin CJ concurring, was the view that the labour arbitration board had departed from previous arbitral decisions and imposed a higher evidential burden on employers who wished to justify random alcohol testing policies. It is the position of the dissenting Justices and the Chief Justice that evidence of "a" problem, as opposed to a "significant" or "serious" problem would justify a random alcohol testing policy. In their view, "an employer does not have to wait for a serious incident of loss, damage, injury or death to occur before taking action." To require the causal connection "is not only unreasonable, it is patently absurd."

implications for employers

It is important to note that this recent decision does not prevent employers from ordering random drug and alcohol testing in a dangerous workplace. The majority in this decision makes it clear that policies representing "a proportionate response in light of both legitimate safety concerns and privacy interests ... may well be justified." Furthermore, employers in a unionized setting remain at liberty to negotiate the implementation of drug and alcohol testing with their union(s).

While the Supreme Court of Canada held that random drug and alcohol testing policies and the intrusion on employee privacy must be proportionate and justified by the employer, it also confirmed the scope of permitted testing, which had been unchallenged by the union at the labour arbitration board. This included circumstances where there is reasonable cause to suspect an employee's use of alcohol or drug use in the workplace following a direct involvement in a workplace accident or injury, or even as part of a monitoring program for an employee's return to work following a substance abuse treatment program.

There is little doubt that this awaited decision will have a significant impact on many other cases in Canada (see our article "*the enforceability of random drug testing is in play*", January 2013 and "*suspect your employee is using drugs or drinking*?", November 2011).

For more information on the scope of permitted testing, how to implement a drug or alcohol testing policy in the workplace or general questions regarding this matter, please feel free to contact:

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labour bill blocked by Canada's Senate: unions relieved

by George Waggott and Ke-Jia Chong, summer law student

Canada's Senate broke ranks with the federal government on June 26, 2013 by blocking a bill which would have mandated public financial disclosure by unions.

While the Senate has been under close scrutiny of late over expenses, the ongoing government business has included a contested debate of Bill C-377, which would require labour organizations to disclose all payments made to outside groups or individuals worth $5,000 or more and salary disclosure for workers earning more than $100,000.

The controversial private member's bill sponsored by Conservative MP Russ Hiebert would amend the *Income Tax Act* and require disclosure of relevant financial information to the Canada Revenue Agency. These statements would then be available on a public website. Similar regimes are already in place in some other jurisdictions.

The ostensible justification for the new requirements is the fact that unions are exempt from taxation. Proponents of C-377 argue that unions should be treated with the same public disclosure requirements that charities follow. Some have also claimed that the move to greater transparency is justifiable since unionized Canadian workplaces impose mandatory dues on employees whether or not they are union members, and union dues are tax deductible.

Critics of C-377 have questioned the bill's impact on privacy rights and its constitutionality. The specific requirements on disclosing political activity also arguably infringe on freedoms of association and expression protected under Canada's *Charter of Rights and Freedoms*. A number of unions have also been vocal about the excessive compliance costs.

The initial vote on C-377 in the House of Commons was tight, and the bill passed in a narrow 147-135 vote in December 2012. The Senate initially voted in favour by 55-35, which resulted in the bill being moved to Second Reading. At this stage, the bill was voted down 49-33.

Those Senators who opposed the bill also passed substantial amendments which effectively gutted the key substantive provisions. Under the Senate's version

of the bill, the disclosure threshold was increased from $100,000 to what some have called the "mischievous" level of $444,661, and the transaction reporting obligation would only be triggered at the $150,000 level. The Senate amendments would also exempt union locals and unions with fewer than 50,000 members.

The result of the Senate vote is that the bill has now been sent back to the House of Commons, which has already recessed for the summer. Although C-377 is a private member's bill, the government has indicated it is supportive, so the issue is quite likely to surface again in the fall.

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hiring a foreign worker? plan ahead and take out your wallet!

by David Elenbaas and Katie Van Nostrand

We published a bulletin in early May when the federal government announced the first in a series of legislative, regulatory and administrative changes to the Temporary Foreign Worker Program (TFWP) "*ensuring Canadians have first chance at available jobs*". Step 2 has now followed.

On July 31, 2013, the government announced further changes that will have an immediate impact on the hiring of foreign workers.

The four major changes are as follows:

- Fee For Labour Market Opinion (LMO) Processing
  - An employer applying for an LMO must now pay a non-refundable processing fee of $275 for each foreign worker requested in an LMO application. Service Canada will not assess an LMO application until the fee has been paid in full.
- Advertising Requirements
  - The advertising period has been increased from two weeks to four weeks.
  - In addition to advertising on the National Job Bank or provincial equivalent, employers must use at least two other methods of recruitment that are consistent with the general advertising practices for the position.
  - If hiring for a higher-skilled occupation, one of the recruitment methods must be national in scope. The Job Bank is not considered to be national in scope.
  - If hiring for a lower-skilled occupation, the employer must demonstrate that it has made efforts to target under-represented groups in the labour force, such as aboriginal youth, persons with disabilities and new immigrants.
  - The employer must continue to actively seek a Canadian for the position until an LMO is actually issued.

- Language Restrictions
    - English and French are the only two languages that can be identified as a job requirement in LMO applications and in job advertisements, unless the employer can demonstrate that another language is essential for the position; for example, a company in the business of translating documents.
- Questions re: Effect on the Canadian Job Market
    - LMO application forms will now include questions surrounding the effect that hiring a temporary foreign worker will have on Canada's job market. These questions have been added to ensure that the TFWP is not used to facilitate the outsourcing of Canadian jobs.

The lengthy advertising requirement will put significant pressure on Canadian employers. Coupled with the current and likely to get longer assessment periods for LMOs, this means that many new hires will not be able to begin work in Canada for at least four months. There are some limited exemptions from the advertising requirements.

Many of these reforms are a direct result of the uproar surrounding the outsourcing of jobs overseas by some larger Canadian employers earlier this year. The outcry was caused by Service Canada's approval of many LMOs to enable foreign nationals to enter Canada to be trained by the Canadians whose jobs they would be taking overseas. Now a refusal to issue an LMO will result if hiring a foreign worker will have a negative impact on the Canadian labour market or if an employer has not complied with TFWP requirements.

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preparing for "round 2" of the AODA: the integrated accessibility standards

by Darryl R. Hiscocks and Paul Boshyk

Ontario private sector employers take note: you may have just successfully complied with the Customer Service Standard requirements, but now you face the first of several new deadlines for compliance under the Integrated Accessibility Standards Regulation ("IAS Regulation"),[1] pursuant to the Accessibility for *Ontarians with Disabilities Act*, 2005.[2]

With few exceptions, the IAS Regulation applies to private sector and not-for-profit organizations that provide goods, services or facilities to the public or a third party business or organization that has at least

[1] O Reg 191/11.

[2] SO 2005, c 11.

one employee in Ontario. In addition, when an organization contracts with a third party to provide goods, services or facilities on its behalf, the organization must ensure that the third party also complies with the IAS Regulation.

overview of near-term obligations

1. policies. Pursuant to the IAS Regulation, by January 1, 2014 all private sector employers with 50 or more employees in Ontario ("Large Providers") must first develop, implement and maintain policies governing how the organization achieves or will achieve accessibility through meeting its requirements under the IAS Regulation. Private sector employers with between one and 49 employees in Ontario ("Small Providers") will have until January 1, 2015 to do the same.

2. statement of organizational commitment. By January 1, 2014, Large Providers must also: develop and include in their accessibility policies a "statement of organizational commitment" to meet the accessibility needs of persons with disabilities in a timely manner; prepare one or more documents describing their policies; make their documents publicly available ; and provide their documents in an accessible format, upon request.

3. multi-year accessibility plan. By January 1, 2014, each Large Provider must also: establish, implement, maintain and document a "multi-year accessibility plan", outlining the Large Provider's strategy to prevent and remove barriers and to meet its requirements under the IAS Regulation; post the plan on its website; and provide the plan in an accessible format, upon request. The plan also has to be reviewed and updated at least once every five years.

overview of future obligations

Looking further into the future, Large Providers and Small Providers will face requirements under the IAS Regulation to develop, implement and maintain additional accessibility policies, on or after January 1, 2015. We will address those requirements in greater detail at a later date. However, in brief, those obligations will include, without limitation, the following:

a) information and communications

Large and Small Providers will be required to provide information to persons with disabilities about their goods, services or facilities, and make feedback processes available, all in accessible formats or with appropriate communication supports. Large Providers will also be required to make their websites accessible to persons with disabilities.

b) employment

Large and Small Providers will be required to address accessibility issues in a number of employment-related areas, including recruitment, supports, emergency response, performance management, career development and advancement, and redeployment.

Large Providers will also be required to develop written individual accommodation plans for employees with disabilities and develop return-to-work processes for employees on disability leave.

c) transportation

Transportation service providers will also have additional, specific accessibility requirements under the IAS Regulation.

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juries punish employers: two recent cases highlight the risk of treating employees poorly[1]

by Lyndsay A. Wasser

article summary

Two recent cases suggest that juries are prepared to punish employers for improper conduct. One long-service employee was awarded over $800,000 in a wrongful dismissal case based upon bad faith conduct. Another employee was awarded over $1.4 million on the basis of workplace harassment and violence leading to constructive dismissal.

full text

Treating employees fairly makes sense, both from a business and legal perspective. From a business perspective, negative treatment of workers can lead to reduced morale and productivity, high turnover rates and increased risk of unionization. From a legal perspective, unfair conduct can lead to constructive dismissal claims, human rights applications, occupational health and safety complaints and claims for various types of non-pecuniary damages in wrongful dismissal actions. Two recent cases indicate that juries in Canada are prepared to impose significant financial penalties on errant employers.[2]

Last summer, a British Columbia jury awarded over $800,000 in damages to a long-service employee whose employer alleged cause for termination of employment.

In *Higginson v Babine Forest Products Ltd. and Hampton Lumber Mills Inc.* ("Higginson"), the employee worked at a sawmill for 34 years prior to the termination of his employment. According to the employee, after the sawmill was sold his new employer intentionally engaged in conduct aimed at creating a hostile and "miserable" work environment, in an attempt to force the employee to resign. He did not resign and his employer ultimately terminated his employment for cause.

The employee took the position that his employer's allegations of cause for termination were simply an attempt to avoid providing him with reasonable pay in lieu of notice. In finding for the employee, the jury in this case awarded Higginson $236,000 in compensatory damages for wrongful dismissal, plus a whopping $573,000 in punitive damages.

[1] This bulletin was first published in *Labour Notes* Number 1469, dated March 4, 2013, by CCH Canadian Limited.

[2] The two cases described herein were jury decisions, and therefore, there are no written reasons for the decisions. All of the facts and findings summarized herein were taken from newspaper articles and other summaries of the cases.

At the time it was decided, Higginson was the highest award of punitive damages in a Canadian wrongful dismissal case, displacing *Keays v Honda Canada Inc.* wherein the trial court awarded the plaintiff $500,000 in punitive damages (which was subsequently reduced to $100,000 by the Ontario Court of Appeal and overturned entirely by the Supreme Court of Canada).

In the fall of 2012, the record set in Higginson was broken by an Ontario jury. In *Boucher v Walmart Canada Corp. and Jason Pinnock* ("Walmart"), a former Walmart employee, Meredith Boucher, was awarded over $1.4 million on the basis of workplace harassment and violence that was found to constitute constructive dismissal.

Boucher claimed that her manager engaged in belittling and demeaning behaviour for months, such as swearing at her and calling her an idiot, as well as making her count wood pallets in front of other employees to prove that she could count. She also claimed that she was punched in the arm twice by another Walmart employee (whose employment was apparently terminated on the date of the second incident).

Boucher resigned from her employment, claiming constructive dismissal caused by an abusive work environment. Her employment agreement provided that upon termination of employment without cause, Boucher would receive two weeks of pay per year of service, which would have been equal to 20 weeks' pay based upon her 10 years of service. However, Walmart actually paid her 32 weeks of termination and severance pay.

Boucher still was not satisfied. She sued Walmart for constructive dismissal, harassment, discrimination, intentional infliction of mental suffering, and assault.

In finding for the plaintiff (after deliberating for less than two hours), the jury awarded:

1. As against Walmart
   - $200,000 for intentional infliction of mental suffering;
   - $1,000,000 for punitive damages; and
   - $10,000 for assault.
2. As against the manager personally
   - $100,000 for intentional infliction of mental suffering; and
   - $150,000 for punitive damages.

Walmart has appealed the jury's decision.

The Higginson and Walmart cases reflect a trend in the law toward protecting employees from workplace bullying, harassment and other improper conduct. A number of Canadian jurisdictions now have legislation that addresses such improper conduct (in addition to human rights legislation that exists in every jurisdiction). Employers would be well advised to heed the message that is being conveyed by legislatures and the courts, by ensuring that employees are treated appropriately during employment and at the time of termination.

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beware a failure to accommodate employee ordered reinstated with back pay after an 11.5 year absence

by David Elenbaas

Most employers are generally aware that they have a duty to accommodate ill or injured employees to the point of undue hardship. The recent decision of the Ontario Human Rights Tribunal in *Fair v Hamilton-Wentworth District School Board* 2013 HRTO 440 demonstrates just how seriously an employer should treat this obligation.

background

Sharon Fair had been employed by the School Board as the Supervisor, Regulated Substances, Asbestos when she went off work in October, 2001 for a generalized anxiety disorder. She was also ultimately diagnosed with depression and post-traumatic stress disorder which eventually put her on long-term disability in March, 2002. In April, 2004 after two years on LTD, Fair was assessed as capable of re-employment but not in her original position. The School Board took the position that there was no suitable position available for Fair in light of her limitations and accordingly terminated her employment in July, 2004.

Fair filed a complaint of discrimination with the Ontario Human Rights Commission in November 2004. As was its wont, the Commission had not fully dealt with the complaint when the current Human Rights Code amendments came into effect, permitting Fair to make a transitional application respecting the same subject-matter directly to the Tribunal in 2009.

In its decision on the merits of Fair's complaint issued in 2012 (2012 HRTO 350), the Tribunal held that the School Board had breached its duty to accommodate by failing "to actively, promptly and diligently" canvass possible solutions to Fair's need for accommodation, including reinstatement in alternative positions. The termination of her employment constituted unlawful discrimination.

remedies

When the parties were unable to agree on the appropriate remedy, the matter came back before the Tribunal which last month ordered the following:

1. reinstatement in a suitable position with a reasonable period (up to 6 months) of training;
2. payment of lost wages from June 26, 2003 (the date the Tribunal found a suitable position was first available but not offered to Fair) until the date of reinstatement (less employment income received and non-repayable benefits);
3. recognition of service under the Ontario Municipal Employees Retirement System (OMERS) and payment of the employer contributions and additional costs associated with the buy-back of service;
4. remittance of retroactive payments to the Canada Pension Plan (or compensation to Fair for any losses arising from lost CPP pension contributions);
5. payment of Fair's out-of-pocket medical and dental expenses since her benefits were terminated in August, 2004;

6. compensation for the tax consequences to Fair of receiving a lump sum payment, rather than having earned the income over time;

7. payment to Fair of $30,000 as compensation for injury to her dignity, feelings and self-respect; and

8. payment of pre-judgment and post-judgment interest.

The Tribunal noted that the remedial objective of human rights legislation is to make the employee "whole". For that reason, reinstatement was held to be the most effective way of righting the wrong. This was particularly so in this case, in the Tribunal's view, because Fair had only been able to find casual and part-time employment since her dismissal by the School Board. Given that the employer in question was a school board, a large employer, it is not difficult to see that reinstatement was a viable remedy. The question is whether it would have been seen to be an appropriate remedy if a much smaller employer had been guilty of discrimination in similar circumstances?

what this means for employers

The important lessons for employers to take away from this decision are (i) treat the duty to accommodate with the utmost seriousness at all times, fully consult with the employee and her medical advisors and carefully and in good faith consider modifications/alternatives, and (ii) understand that the passage of time will not necessarily diminish an employee's right to reinstatement (not to mention significant damages) when she has been discriminated against.

As of this writing it is unclear if the School Board has or will be seeking reconsideration/ judicial review of this decision.

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Canadian mining companies: is there liability in Canadian courts for activity in foreign countries?

by George Waggott and Darrell W. Podowski

The increasing scrutiny and potential liability of Canadian multinationals has received further media attention as a result of a decision issued on July 22, 2013 by the Ontario Superior Court of Justice. In her reasons in *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414, Madame Justice Carole J. Brown dismissed a preliminary motion which sought to strike claims against Hudbay Minerals Inc. ("Hudbay") and its subsidiaries.

The decision involved three related actions against Hudbay brought by an indigenous Mayan Q'eqchi' group from Guatemala. The claims all alleged that security personnel working for Hudbay subsidiaries, who are allegedly under the control and supervision of Hudbay, committed human rights abuses. The specific allegations include shooting, killing and gang rapes allegedly committed in the vicinity of a proposed open pit nickel mining operation.

The defendants sought to strike all three consolidated actions on a variety of grounds, including that there is no recognized duty of care. Hudbay argued no duty is owed by a parent company to ensure that the commercial activities carried on by its subsidiary in a foreign country are conducted in a manner designed to protect those people with whom the subsidiary interacts.

The plaintiffs opposed the motion in large part based on their argument that Hudbay was directly liable for actions leading to the alleged damages based on human rights abuses. In this regard, the plaintiffs pointed to on-the-ground management of the relevant project as well as management of relevant security personnel. It was also noted that Hudbay made statements publicly that they were committed to adhering to certain standards of conduct, including adherence to Guatemalan international law and the *Voluntary Principles on Security and Human Rights*.

Amnesty International Canada ("Amnesty") was granted intervenor status in the proceedings and supported the plaintiffs in opposing the motion to strike. Amnesty also referred other international guidelines and standards relating to corporate responsibility and human rights.

The Court's decision to dismiss the motion to strike has been heralded by some as confirmation of an expansion of the scope of liability of the activities of multinationals. On a close reading of the decision, the exact implications of the ruling remain to be seen. The Court noted that the test to strike a claim, which must be based solely on a reading of the plaintiff's pleadings as presented, is stringent. In the specific circumstances, the Court noted that there are competing policy considerations in recognizing a duty of care between a Canadian company and individuals harmed by security personnel at its foreign operations. While the approach to claiming negligence was described as "novel", it does not therefore automatically mean that such a claim will be clearly unsustainable or untenable.

There are many other issues referenced in the ruling, and the specific outcome on the motion was based on a legal question which only serves as a preliminary determination of how the case will proceed. The actual merits of the allegations remain unproven.

The Hudbay decision does align with a recent trend, which is that courts in Canada appear to be taking an expansive view of their own jurisdiction in respect of events that take place outside of our borders. Particular attention should therefore be paid to cases where employees are working or employing contractors in other jurisdictions, and company policies and relevant agreements should be reviewed carefully as case law in this area evolves.

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"modern family": the Federal Court recognizes an employer's duty to accommodate childcare obligations

by Dave J.G. McKechnie and Tim Hughes, student at law

As the show "Modern Family" demonstrates, families are complicated, diverse and demanding (but not necessarily with the same humourous results as a TV sitcom). Employees and employers continue to struggle to find a balance between employment obligations and family responsibilities. The recent decision of the Federal Court in *Attorney General of Canada v Johnstone*[1] ("*Johnstone*"), indicates that employers are required to adjust to this new landscape and accommodate an employee's "routine" childcare obligations.

background

Ms. Johnstone was employed by the Canada Border Services Agency (the "CBSA"). After the birth of her children, she asked the CBSA to provide her with a full-time, fixed day shift so that she could manage her childcare arrangements. While fixed day shifts were available to part-time workers, the CBSA had an unwritten policy that full-time officers, like Ms. Johnstone, must work a rotating shift schedule. The CBSA was willing to provide Ms. Johnstone with a part-time shift, but transferring to part-time had a negative impact on Ms. Johnstone's earnings and eligibility for benefits and pension.

Ms. Johnstone brought a complaint under the *Canadian Human Rights Act*, alleging that the CBSA's conduct was discriminatory on the basis of family status. The Canadian Human Rights Tribunal found in favour of Ms. Johnstone and the CBSA appealed the Tribunal's decision to the Federal Court.

what is family status?

The scope of "family status" has been the subject of a number of provincial and federal court and tribunal decisions, leaving employers unclear on what relationships and obligations are included under the ground of family status, as protected by provincial and federal human rights legislation.

The *Act* does not contain a definition of family status. The Tribunal in *Johnstone* held that family status is not limited to the identification of relationships, but also includes the needs and obligations flowing from those relationships, including childcare obligations. The Federal Court upheld the Tribunal's interpretation of family status, finding that it was reasonable and consistent with the purpose of the *Act*.

discrimination on the ground of family status

Having found that childcare obligations are included in the scope of family status, the Court reviewed what would constitute discrimination on the grounds of family status when it came to childcare obligations.

There are a number of decisions from provincial tribunals and courts that are not easy to reconcile. A relatively restrictive test was established in the British Columbia Court of Appeal decision of HSABC v Campbell River & North Island Transition Society.[2] In Campbell River, the Court of Appeal found that for a

[1] Attorney General of Canada v Johnstone, 2013 FC 113.

[2] Health Sciences Association of BC v Campbell River and North Island Transition Society, 2004 BCCA 260

prima facie case of discrimination to be made out, a change in employment terms must result in a "serious interference with a substantial parental or other family duty."[3]

In contrast, a broader test was applied in the Ontario Human Rights Tribunal decision of Devaney v ZRV Holdings Limited.[4] The Devaney ruling held that any genuine inability to work due to family care responsibilities places a duty on an employer to investigate the basis for the request for accommodation and consider how accommodation will be achieved.

In Johnstone, the Federal Court took a position closer to Devaney, holding that the "serious interference" standard in Campbell River was too high a threshold that would lessen the protection for family status relative to other prohibited grounds of discrimination. The Federal Court held that the question to be asked is whether the employment rule "interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way."[5]

In finding that parental childcare obligations are a component of "family status" for the purpose of the Act, and that inflexible rotating shift requirements interfered with Ms. Johnstone's ability to fulfill these obligations, the Court upheld the Tribunal's finding of prima facie discrimination.

Similar to the Tribunal in Devaney, it is important to note that the Court in Johnstone was critical of the CBSA's failure to make efforts to accommodate Johnstone's request as well as its "unwritten policy" to not provide full-time day shifts to employees.

what this means for employers

As the *Johnstone* decision dealt with the *Act*, its application is, in theory, restricted to federally-regulated employers. However, the *Johnstone* decision highlights the move towards providing a broader level of protection for employees with childcare obligations. As a result, employers are likely going to face more requests from employees for accommodation in scheduling.

Rather than a worker having to demonstrate unusual needs to warrant accommodation, *Johnstone* suggests that the onus may be shifting to employers to accommodate employees where their parental childcare arrangements may simply be difficult or impractical. The implications of these decisions are particularly acute for employers of shift workers. Many rotating shift workers will prefer a fixed daytime shift to manage childcare obligations.

Employers should review what policies they have in place for accommodating changes to an employee's schedule when faced with these types of requests. Legal counsel should be sought prior to denying an employee's request for accommodation to ensure that the employer has met its obligations under applicable human rights legislation.

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[3] *Ibid* at para 39.

[4] Devaney v ZRV Holdings Limited, 2012 HRTO 1590. [see: an update on family status discrimination]

[5] *Supra* note 1 at para 128.

determining a set-off: BC *Employment Standards Act* awards set-off against wrongful dismissal damages

by Claire E. Morton

For the first time, the British Columbia Supreme Court has addressed the issue of deducting certain amounts awarded under the B.C. *Employment Standards Act* ("ESA"), from the damages recoverable in a wrongful dismissal action.

In Roy v Metasoft Systems Inc. 2013 BCSC 1190 ("Roy"), the Court accepted the employer's argument that failing to set-off the amount of a Determination under the ESA would amount to an unwarranted double recovery.

In Roy, the plaintiff employee was a sales consultant who advised her employer in 2010 that she had not received all of the commissions to which she was entitled. The employee was not satisfied by the resolution of the matter and proceeded to file a complaint, alleging that the company had failed to pay compensation for length of service and had refused to continue to employ her in contravention of the ESA.

In November 2011, the Director of Employment Standards issued a Determination which found that the employer had contravened the ESA, and rendered a $500 administrative penalty. In addition, as a result of these findings, the employee was also awarded with lost "wages" for a period of six months pursuant to section 79(2)(c) of the ESA, which requires the employer to "pay a person compensation instead of reinstating the person in employment".

Less than six months after the Determination was issued, the plaintiff commenced a civil action claiming, amongst other things, damages for wrongful dismissal. In its Response to Civil Claim, the defendant employer pleaded that the ESA award "constituted both statutory compensation for length of service and compensation to address what the plaintiff would have earned in lieu of reinstatement." The former employee argued that the ESA award was granted as a remedy against an employer for behaving in a way that obstructs the operation of the ESA and as a result, it ought not to be deducted from the common law damage award for breach of contract.

After a thorough analysis, Mr. Justice Joyce agreed with the defendant that section 79(2)(c) of the ESA was largely compensatory in nature, and its purpose is to make the employee "whole". As a result, the failure to set-off this amount would result in double recovery. Further, the Court held that this conclusion accords with the law in Ontario with respect to the same issue involving similar legislation.

The Roy case is important for employers as it now affirms the fact that compensatory payments made under the ESA are to be set-off against wrongful dismissal damages. It is worthy to note, however, that the set-off does not mean an employee is barred from bringing an action when there has been a

Determination pursuant to section 79(2)(c). In fact, employers should be aware that the Court noted that, in fact, an employee's damages for wrongful dismissal may actually exceed the amount of the determination. This may lead to the interesting result that employees with employment standards complaints could well now be more inclined to proceed directly with civil claims in the courts.

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can an employer waive the employee's notice of resignation without paying any indemnity? - the Québec Court of Appeal says it can

by Robert Boyd

The employer's duty to provide reasonable notice when terminating an employee without cause has its legal counterpart in the employee being required to give reasonable notice of resignation. Also, while the employee may claim damages in lieu of reasonable notice in the event of termination without cause, the employer, on the other hand, may claim from the employee any and all damages arising from his or her failure to provide reasonable notice before leaving the company.

In practice, the resigning employee is often asked by the employer to leave before the end of the notice period. It is generally assumed that, during such period, the resigning employee is in a position of conflict of interest or will not fully devote himself or herself to his or her duties. In Québec, until recently, an employer who decided to ask an employee to leave prior to the end of the notice period was required to pay his or her salary until the end of such period. In fact, the largely predominant case law tended to equate the employer inducing its employee to leave prior to the end of the notice period to a dismissal which gave rise to the employer's duty to pay severance to the employee. In such a case, employee's salary for the remainder of the notice period was deemed to be adequate compensation.

Recently, the Québec Court of Appeal[1] overturned this general rule by deciding that an employer may waive a notice of resignation. The Court mentions that, in such case, the resignation becomes effective immediately and does not entail a duty on the part of the employer to pay severance. The majority[2] of the Court of Appeal points out that the employee's duty to give notice of resignation provides protection to the employer as it allows for a reasonable period time to find, hire and train a new employee. However, the employer may waive such protection, in which case there is no reason why the resignation should become a dismissal giving rise to severance pay.

facts of the case

On a Friday, the employee submitted a letter of resignation to his employer giving three weeks' notice prior to leaving. The employee was leaving to work for a competitor. On the following Monday, the employer asked him to leave immediately and refused to pay severance.

The *Commission des normes du travail*, acting on behalf of the employee, claimed severance pay equal

[1] *Asphaltes Desjardins inc. c. Commission des normes du travail*, 2013 QCCA 484

[2] One of the three judges does not agree with the retained approach with regard to the possibility for the employer to reject the notice of resignation without the obligation to pay any compensation to the employee

to the employee's salary for three weeks. The trial judge allowed the claim and concluded that the employer had dismissed the employee by requesting that he leave prior to the effective date of his resignation. Consequently, the employer was required to pay the employee an indemnity in lieu of notice. In so doing, the trial judge applied the largely predominant case law according to which termination prior to the end of the notice period was deemed to be a dismissal.

decision

The majority of the Court of Appeal analyzed the nature of the employee's duty to give reasonable notice of resignation. Just like a notice of termination by the employer, the notice of resignation is intended to allow the employer a reasonable time to react to its employee leaving. The employer has the right to receive reasonable notice of resignation. However, the Court of Appeal considered that nothing prevented the employer from waiving such notice. In this case, the mere fact of the employer waiving the notice should not turn a resignation into a dismissal.

The waiver of the notice of resignation by the employer has the effect of immediate termination of the employment relationship. Consequently, since the termination was initiated by the employee, the employer has no duty to pay severance or any other form of compensation to the employee.

The majority of the Court of Appeal recognized that its judgment might sometimes place the resigning employee in a difficult situation. Indeed, the resigning employee will be torn between his or her duty to give reasonable notice of resignation and the risk that the employer might waive it. In this latter case, the employee would risk unexpectedly finding himself or herself without remuneration for the remainder of the notice period. And what about employees giving notice to their employer of their retirement 12 months in advance? Do they risk losing their 12-month salary if the employer waives the notice? The Court of Appeal mentions that, in some cases, the employee may claim damages on the grounds that the employer exercised its right of waiver in an abusive manner. However, such a remedy remains hypothetical and would obviously involve costs and delays associated with legal proceedings.

In the end, the majority of the Court of Appeal decided that the employer may now waive a notice of resignation without being obligated to pay the salary until the end of the notice period. Only legislative amendments could change this situation.

In a strong dissent, one of the three judges of the Court of Appeal refused to endorse the principle that an employee risked losing his or her salary for the duration of notice period by reason only of the fact that he or she complied with his or her duty to give reasonable notice of resignation.

discussion

This judgment of the Court of Appeal represents an important change in Québec employment law. Employers should now be made aware that they have no duty to allow their employees to work until the end of the notice period or to pay them severance during such period. Notice of resignation is a protection offered to the employer which it may waive without having to compensate the employee.

It is true that the Court of Appeal mentions that employers should not abuse their right to waive notice of resignation, and, to this end, the Court cites

the example of an employee providing a 12-month notice of resignation. In such a case, the Court states that the employee might allege that the employer abused its right to waive notice of resignation and could file a claim for damages. Obviously, the Court of Appeal is clearly aware that its approach, in granting the employer the right to waive notice of resignation, might lead to inequitable situations where employees will risk losing their salary for the duration of the notice period merely because their wished to fulfill their duty to give a reasonable notice of resignation to their employer.

It will be interesting to see how this case will be applied by the courts. Some might say that the Court of Appeal has created some uncertainty. Employees will face the difficult dilemma of giving reasonable notice of resignation while running the risk that the employer might immediately waive their notice and forthwith discontinue payment of their salary. At the same time, employers will have to decide if they wish to waive the period of notice of resignation without any guarantee as to whether such waiver might represent an abuse of the employee. In that regard, the Court of Appeal does not provide any guidelines for employers to help them determine when their waiver of notice of resignation might be considered as an abusive exercise of a right which may give rise to a claim for damages.

In light of this case, employers may be well advised to seek appropriate counsel before waiving the employee's notice period and immediately ceasing payment of salary, especially where such notice is provided several months in advance.

Finally, it is interesting to consider the approach of the Ontario Court of Appeal in the leading case of *Oxman v Dustbane Enterprises Ltd.*[3] In that case, an employee resigned and provided the employer with six months' notice. The employer refused to maintain the employment relationship for that long and notified the employee of his termination and offered him a severance package with a shorter notice than the six months tendered. The Ontario Court of Appeal held that the employer could lawfully waive the notice of resignation. However, in the Court's opinion, the employment relationship is not terminated by waiver of the employee's notice of resignation by the employer. If the employer wishes to terminate the employee, it is required to provide the employee with reasonable notice prior to his or her termination or compensation in lieu thereof. Under the circumstances, the Ontario Court of Appeal was of the view that reasonable compensation would be six months' salary equal to the initial notice of resignation provided by the employee. The Court's reasoning in this case is in line with the traditional approach of the Québec courts in those cases preceding the matter of *Asphaltes Desjardins inc. c. Commission des normes du travail*, according to which an employer's decision to terminate an employee prior to the end of the period of notice of resignation amounted to a dismissal requiring a reasonable notice on the part of the employer. As mentioned above, the Québec Court of Appeal no longer supports the idea that a resignation may be equated with a dismissal by reason only of the fact that the employer waived notice of resignation.

While some distinctions should be made between the employment relationship governed by the *Civil Code*

[3] *Oxman v Dustbane Enterprises Ltd*, [1988] O.J. No. 2067 (ONCA).

of Québec and that existing in common law provinces, we believe that the matter of *Asphaltes Desjardins inc. c. Commission des normes du travail* might have a ripple effect in common law provinces, where the duty to give reasonable notice of resignation is based on the same principles. But until then, the *Commission des normes du travail* might seek leave to appeal to the Supreme of Court of Canada, given the importance of the rights at stake.

At the time of publication, no motion for a leave to appeal has been filed, although the time period for doing so had not expired.

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"will work for free!": employers, beware of offers of free work by unpaid interns

by Lai-King Hum and Kristen Pennington, student at law

Mix high unemployment amongst recent graduates with a desire to gain experience and contacts by working for free, and a seemingly ideal opportunity for employers is created. However, employers expose themselves to claims and liability if they are seduced by the "free work" temptation to offer an unpaid internship without understanding what it entails.

This situation has gained considerable attention in the United States in recent years, spawning many individual lawsuits and several significant class actions. In the last year alone, high profile class actions include one for $50 million dollars against Elite Model Management and another one involving 40 unpaid interns at a law firm alleged to be an "intern mill".

The issue has also garnered a clamour of media and political attention in Canada in the last few years. Most recently, media reports suggest that one of the country's largest employers is offering an illegal internship program and taking advantage of young unemployed people eager to gain any foothold into employment. A complaint has been filed with Human Resources and Skills Development Canada for unpaid wages.

In light of the experience in the United States, the time seems ripe for a class action to materialize in Canada, particularly against employers who regularly use unpaid interns. The financial stakes can be very high.

What are the laws in Canada regarding unpaid internships? Provincial and federal employment legislation set out the rules and regulations for employees. However, there is no clarity on what is meant by an "intern". Employers need to refer to applicable employment standards legislation to ensure that their "intern" does not fall into the definition of an "employee" performing work in return for wages.

British Columbia's Interpretation Guidelines Manual notes that an "internship" is on-the-job training offered by an employer to provide a person with practical experience, as opposed to "work" which refers to the labour or services performed by an employee in return for wages.

The Ontario Ministry of Labour provides a fact sheet, "Are Unpaid Internships Legal in Ontario", addressed

to those working as an "intern". Based on the fact sheet, an intern that does not meet all the following stringent conditions is an "employee":

- Is the training similar to that received in a vocational school? Training would include instruction, supervision, and evaluation, and entail skills-training specific to a particular field or industry.
- Is the training for the benefit of the intern? The internship must be focused on the training of the intern, and the employer is to receive little if any benefit from the training. If the employer receives the benefit of the intern's work, then the intern must be paid as he or she has provided a service.
- Does the training replace the work of another employee? The intern must not be given work that a paid employee would ordinarily do.
- Has the intern been promised a job at the end of the training? The intern may be advised of the legitimate possibility of a job at the end of the training, but may not be promised a job once the internship is completed. If the latter, the intern would be considered an employee.
- Have you made it clear that the internship is unpaid? Interns must be advised in advance that the internship is unpaid.

In Québec, a regulation under the employment legislation refers to unpaid interns as "stagiaires" or trainees. Employees who are trainees are not subject to the application of the employment standards legislation if they are under a program of vocational training recognized by law, the nature and duration of which is also determined by that law.

There is no other mention of interns in Canadian law. Most of the other provinces define "work" and "employee" broadly, but generally link either employee or work with an agreement for the payment of wages. Newfoundland's legislation does not define work, and simply defines "employee" as a natural person who works under a contract of service to an employer, which seems to imply that all interns must be paid at least a minimum wage.

In light of the confused state of the law across Canada, any employer considering taking up a person's offer to "work for free" must beware. Offering an unpaid internship to a person who ought legally be characterized as an "employee" may subject the employer to significant and unexpected liability for unpaid wages, vacation and holiday pay, overtime, and possibly termination pay if the employer ended the internship. There may also be issues related to workers' compensation insurance and vicarious liability for the actions of the intern/employee. If the mischaracterization relates to a large number of interns in a flawed internship program, the employer faces potentially ruinous liability in a class action proceeding.

Any employer considering offering unpaid internships should be fully familiar with the applicable employment standards, and consider having detailed documentation about the internship and the training benefit available for the intern. To minimize the risk of claims and complaints, and potential liability, employers should consult an experienced lawyer who can assist in the implementation of the internship program.

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Facebook posts about co-worker sanctioned by human rights law

by George Waggott and Paul Boshyk

Further clarity regarding the application of human rights protections to workplace-related social media postings has emerged following a recent decision of the Human Rights Tribunal of Ontario (the "Tribunal"). Specifically in *Perez-Moreno v Kulczycki*,[1] the Tribunal found that comments made by an employee about a co-worker on Facebook constituted harassment in employment contrary to subsection 5(2) of the Ontario *Human Rights Code* (the "Code").

The case emerged after the applicant Oscar Perez-Moreno, a manager at the Cranberry Golf Resort, intervened in a workplace argument between two co-workers, including the respondent Danielle Kulczycki. Two days after the incident, Ms. Kulczycki posted on her Facebook account that she had been written up at work for calling Mr. Perez-Moreno a "dirty Mexican". She also indicated to other employees that "now that Mexican is not going to give me anything." Understandably insulted by the comments which he felt were humiliating and damaging to his character, Mr. Perez-Moreno brought a complaint to the Tribunal citing numerous protected grounds including race, ancestry, place of origin, citizenship and ethnic origin. His complaint to the Tribunal also noted that his son's classmates were aware of the posting and that this contributed to the severity of Ms. Kulczycki's conduct.

The Tribunal upheld the complaint and confirmed that the protections under the Code extend to workplace-related postings on the Internet. In communicating her comments on Facebook, Ms. Kulczycki engaged in what amounted to harassment (defined as "a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome") in employment contrary to the Code. The Tribunal opined that Ms. Kulczycki's comments were clearly related to an incident that occurred in the workplace and that she ought reasonably to have known that they were unwelcome by Mr. Perez-Moreno.

Monetary damages were not awarded in this case because they were not sought by Mr. Perez-Moreno. However, the Tribunal did order that Ms. Kulczycki complete the Ontario Human Rights Commission's online training module. The employer, who was not a party to the complaint, was also encouraged to consider whether human rights training might benefit all of its employees.

The Perez-Moreno decision is part of the growing body of law which confirms the application of the Code and other employment-related legislation to employees' social media conduct. While some observers might consider the specific comments in this case to be at the lower end of the spectrum of concern, the fact is that the full powers of the Tribunal to fashion appropriate remedies are in play whenever an employee's (or employer's) unwelcome conduct constitutes harassment or discrimination under the Code. With the foregoing principle in mind, employers are strongly advised to develop and implement appropriate human rights training as well as a policy that addresses social media use by its employees. Further, employers are reminded of their obligation

[1] 2013 HRTO 1074 (CanLII).

under the *Occupational Health and Safety Act* to implement a policy that addresses harassment in the workplace.

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top five workplace privacy questions

by Lyndsay A. Wasser

answers to employers' most frequent privacy inquiries

In Canada, privacy is a relatively new and evolving area of law that is governed by a complex network of provincial and federal legislation as well as the common law. Set out below are brief, general responses to employers' five (5) most common questions about workplace privacy.

(1) do employees have privacy rights?

Privacy legislation across Canada restricts and regulates collection, use, disclosure, storage and security of personal information. However, in some jurisdictions there is no privacy legislation applicable to private sector, provincially regulated employers, with respect to employee personal information and employment matters. The main privacy legislation applicable to private-sector employers is as follows:

- Federally regulated employers – The Personal Information Protection and Electronic Documents Act.
- Employers in Alberta – The Personal Information Protection Act.
- Employers in British Columbia (B.C.) – The Personal Information Protection Act.
- Employers in Quebec - An Act respecting the Protection of Personal Information in the Private Sector. See also the Civil Code of Quebec and the Quebec Charter of Human Rights and Freedoms.

There are also statutory torts of invasion of privacy in British Columbia, Manitoba, Newfoundland and Saskatchewan, and most provinces (including Ontario) have specific legislation governing protection of health-related personal information. Further, separate legislation exists in each province, which is applicable to public-sector organizations. In addition, the *Criminal Code* of Canada creates the following privacy-related offences: (1) Using a device willfully to intercept a private communication without the express or implied consent of the originators or intended recipient; and (2) Intercepting fraudulently and without colour of right any function of a computer system.

In jurisdictions that have not enacted privacy legislation applicable to employment matters, employee privacy rights are less clear. In unionized workplaces there is some arbitral case law that recognizes workplace privacy rights (esp., relating to monitoring, drug and alcohol testing, medical testing

and/or searches of employees and their property). However, some arbitrators have rejected the proposition that employees have privacy rights in jurisdictions that are not governed by privacy legislation. Where privacy rights are recognized by arbitrators, they are generally assessed with reference to the applicable collective agreement.

In non-unionized workplaces, the existence and scope of employee privacy rights is unclear. However, in the recent Ontario case of *Jones v Tsige*,[1] the Ontario Court of Appeal definitively recognized a new tort of "intrusion upon seclusion". Specifically, the Court of Appeal stated that "One who intentionally [or recklessly] intrudes, physically or otherwise, upon the seclusion of another or his [or her] private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person." Employers have already begun to see "intrusion upon seclusion" claims from employees, and are likely to continue seeing such claims going-forward.

(2) can employers conduct background checks?

Generally employers can conduct background checks on job applicants and employees. However, federal employers and employers in Quebec must first obtain consent to such background checks, and employers in Alberta and B.C. must provide advance notice of such checks, in accordance with applicable legislation. Further, under the privacy laws in these jurisdictions, employers must advise job applicants and employees of the purposes for which their personal information will be collected, used and disclosed, and the background checks must be limited to those that are reasonably required to assess the employee's suitability for continued or prospective employment. Therefore, for example, employees should not be subject to driving records checks if their job duties do not involve driving or operation of a vehicle.

For provincially-regulated employers outside Alberta, B.C. and Quebec, the law respecting background checks is unsettled. In one prior Ontario case (*Somwar v McDonalds' Restaurants of Canada Ltd.*),[2] the court refused to dismiss an employee's claim that his employer breached his privacy rights by conducting a credit check on him without his knowledge or consent. However, this case only considered whether the matter should be dismissed at a preliminary stage, on the basis that it disclosed no reasonable cause of action. The Court did not determine whether the employer had, in fact, breached the employee's privacy rights. Since this case was never decided on its merits, the common law respecting background checks is still unclear. However, it is possible that an employee could claim that an unreasonable background check, performed without his/her consent, constitutes an "intrusion upon seclusion" under the common law.

In addition to the above, employers should be aware that there are laws that do not relate to privacy, which may apply to background checks (e.g., human rights laws and consumer reporting laws).

(3) can employers monitor employees?

Privacy commissioners and arbitrators have developed different tests to evaluate whether monitoring of employees is acceptable. Although such tests were

[1] *Jones v Tsige*, 2012 ONCA 32.

[2] *Somwar v McDonalds' Restaurants of Canada Ltd.*, 79 OR (3d) 172.

typically created to evaluate video monitoring, they have been applied to other types of monitoring as well (e.g., monitoring email and internet use, GPS tracking etc.). There are some inconsistencies between adjudicators, however, generally the tests applied in the different jurisdictions are as follows:

(i) federal privacy commissioner

- Is the measure demonstrably necessary to meet a specific need?
- Is the measure likely to be effective in meeting that need?
- Is the loss of privacy proportional to the benefit gained?
- Is there a less privacy-invasive way of achieving the same end?

(ii) Alberta privacy commissioner

- Does a legitimate issue exist to be addressed through the collection of personal information?
- Is the collection of personal information likely to be effective in addressing the legitimate issue?
- Is the collection of personal information carried out in a reasonable manner?

(iii) Quebec privacy commissioner

- The surveillance must be necessary in order to manage the workplace.
- The surveillance must not be carried out in an arbitrary manner.
- The surveillance must be based on other evidence that already exists against the worker.
- The surveillance must be conducted in the least intrusive manner possible.

(iv) factors considered by arbitrators with respect to unionized workplaces

- Whether the surveillance is reasonably required in light of the circumstances;
- Whether the surveillance is conducted in a reasonable manner; and
- Whether there are no alternatives to the surveillance.

For non-unionized, provincially-regulated employers outside of Alberta, British Columbia and Quebec, there are no legislative restrictions or clear guidelines respecting monitoring employees. However, one previous case indicates that implementation of video monitoring may constitute constructive dismissal on the basis that it creates a hostile work environment. Further, based on *Jones v Tsige*, employees may now allege that unreasonable monitoring constitutes an "intrusion upon seclusion" under the common law.

(4) can employers share employee information with foreign affiliates?

With the possible exception of Quebec, it is generally permissible for an organization to transfer employees' personal information to affiliates in the United States of America and other foreign jurisdictions, provided certain conditions are met.

Under federal, Alberta and B.C. privacy legislation, organizations must ensure a comparable level of protection to that which the applicable legislation provides when the information is transferred to a third party for processing and/or is still under the organization's control. A data protection agreement

between the Canadian organization and the foreign affiliate may be necessary in such circumstances, unless the affiliate's privacy policies and data protection practices are comparable to the Canadian entities policies and practices. If the personal information is being disclosed to a foreign affiliate (for the affiliate's purposes and not for processing on behalf of the employer), employees' consent to such disclosure may be required (or advance notice in Alberta and B.C. if the disclosure is reasonable for the purpose of establishing, managing or terminating the employment relationship).

In addition to the above, Alberta's privacy legislation contains the following specific requirements when information will be transferred to a "service provider" (which includes a parent company, subsidiary or other affiliate which directly or indirectly provides a service for or on behalf of the organization) outside Canada:

(i) The organization must have privacy policies that include information regarding the countries outside Canada where the collection, use, disclosure or storage of personal information is occurring or may occur, and the purposes for which the service provider outside Canada has been authorized to collect, use or disclose the personal information; and

(ii) Individuals must be notified of the cross-border transfer of their personal information, in advance, including information about how the individual can obtain access to written information about the organization's policies and practices with respect to service providers outside Canada, and the name, position or title of a person who is able to answer the individual's questions about the collection, use, disclosure or storage of personal information by service providers outside Canada.

The federal Privacy Commissioner has also taken the position that organizations should inform individuals that their information will be transferred to a foreign jurisdiction and subject to the laws of such jurisdiction, before personal information is transferred outside Canada.

Quebec takes the strictest approach to transferring information to foreign entities. Under *An Act respecting the Protection of Personal Information in the Private Sector*, employees must be notified of the location where their personal information will be held. Further, the Act provides that if an organization communicates personal information outside Québec or entrusts a person outside Québec with the task of holding, using or communicating such information on its behalf, the organization must first take all reasonable steps to ensure that the personal information will not be used for purposes other than the purposes for which it was collected or communicated to the third person (except with the consent of the employee concerned). If the organization cannot ensure that the information will not be misused, then it must refuse to communicate the information or refuse to entrust a person or a body outside Québec with the task of holding, using or communicating the information.

(5) are employees entitled to access employers' records?

Employees in Alberta, British Columbia and Quebec, as well as employees of federally regulated organizations, are entitled to access any or all of their personal information (generally within prescribed time limits and at little or no cost to the employee). Employees are also entitled to challenge the accuracy and completeness of information held by employers,

and to have such information amended if it is inaccurate or outdated.

There are some exceptions to employees' general statutory rights to access their personal information. Such exceptions vary in different jurisdictions, but some examples include:

- Information that would likely reveal personal information about a third party, unless the third party provides consent;
- Information that would reveal confidential commercial information;
- Information that is subject to solicitor-client or litigation privilege and/or information that was generated in the course of a formal dispute resolution process;
- Information that could reasonably be expected to threaten the life or security of an individual; and/or
- Information that was collected without the individual's knowledge or consent for purposes related to investigating a breach of an agreement (including an employment agreement) or a contravention of the law.

However, the above exceptions have generally been construed narrowly, and if the information that fits within the exception can be severed, in some cases it must be severed and the employee is entitled to the remaining personal information.

As the common law respecting employee privacy rights is still developing, it is unclear whether employees of provincially-regulated, private-sector employers outside Alberta, B.C. and Quebec have any right to access their personnel files or other personal information held by the employer. However, for unionized employers, the applicable collective agreement may contain a clause that entitles employees to view their personnel files. Some non-unionized employees may also have the right to access their personal information under the employers' policies.

conclusion

Although this short paper provides a brief, general overview of some important privacy matters, regional differences exist and every fact scenario has the potential to raise unique legal issues. Given the complex framework of privacy laws in Canada, employers are encouraged to seek legal counsel before taking any action (or omitting to take any action) that could have privacy implications.

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