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ALBERTA COURT CONFIRMS AND CLARIFIES REQUIREMENTS FOR RANDOM DRUG TESTING

— Christopher Munroe of Roper Greyell LLP.

Background

In the recent case of *Suncor Energy Inc. v. Unifor, Local 707A*, 2016 ABQB 269, the Court of Queen's Bench of Alberta confirmed and clarified the test that an employer must meet in order to justify the unilateral imposition of random drug and alcohol testing in a unionized workplace. Specifically, the Court confirmed that: (a) an employer has to demonstrate a "general problem" with alcohol and drugs in the workplace, but that the problem need not necessarily be "serious" or "significant"; (b) the employer need not demonstrate a threshold causal connection between a drug and alcohol problem and accident history; and (c) evidence of a problem can come from the entire workplace and not just from the bargaining unit.

Briefly, the facts of this case were as follows. Suncor Energy operated two oil sands facilities in Alberta. At times, these facilities had nearly 10,000 workers, approximately 34 per cent of which were Unifor bargaining unit members. Unifor and Suncor agreed that the oil sands operations were dangerous workplaces. Suncor introduced a random drug and alcohol testing policy for employees in safety-sensitive roles in order to deal with what it said was a widespread drug and alcohol problem at its facilities. Unifor grieved the random testing policy.

At arbitration, the majority of the three-member panel found that the random testing policy was unreasonable. The majority relied on its interpretation of the Supreme Court of Canada's decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34 ("*Irving*"). The majority cited *Irving* for the proposition that the employer needed to demonstrate a "significant" or "serious" drug and alcohol problem with a causal link to accident history at the workplace, and that the employer needed to present evidence of that problem which specifically related to the bargaining unit. The majority found that Suncor had failed to meet these requirements. Suncor applied for judicial review by the Court of Queen's Bench of Alberta.

Decision

The Court quashed the majority's decision and remitted the matter to arbitration on the basis that the majority misapprehended and misapplied the *Irving* test. The Court noted that a dangerous workplace does not, in and of itself, justify random testing, and a balancing of privacy and safety interests on a case-by-case basis is required. In the view of the Court, the majority had imposed more stringent requirements than what is necessary.

In addition, the Court noted that the majority failed to take into account the fact that the workplace was integrated between union, non-union, and contractor workers and erred in requiring evidence specific to the bargaining unit. The Court found that the extensive evidence in relation to the entire workplace which Suncor adduced should have been considered by the arbitration panel.

This is a helpful decision to clarify the *Irving* test, which some arbitrators have been interpreting to require a very prevalent drug or alcohol problem. The decision also confirms that arbitrators should use a practical and common-sense approach in considering evidence in relation to the entire integrated workplace rather than just the bargaining unit.

Takeaways for Employers

- Whether random drug or alcohol testing is justifiable in a safety-sensitive workplace is assessed on a case-by-case basis. This sort of testing is not automatically acceptable.
- An employer must, at a minimum, adduce evidence of a general problem with alcohol and drugs in the workplace, but the problem does not necessarily have to be "serious", "significant", or "egregious".
- There is no requirement to adduce evidence of the problem specifically in relation to the bargaining unit. Evidence from the entire workplace is relevant and helpful. This is a common-sense approach in modern industrial workplaces where union, non-union, and contractor workers work, and sometimes live, side by side.
- There is no requirement to demonstrate a causal connection between a drug and alcohol problem and accident or near-miss history at the workplace. This is, however, certainly helpful in demonstrating a problem.

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ONTARIO COURT OF APPEAL UPHOLDS LANDMARK HUMAN RIGHTS DECISION: REINSTATEMENT WITH FULL BACK PAY AFTER A 14 YEAR ABSENCE

— David Elenbaas—Senior Counsel and Chief Professional Officer, McMillan LLP.

Back in April 2013, we reported on the decision of the Human Rights Tribunal of Ontario to order the reinstatement of a dismissed employee with full back pay and other significant monetary remedies following what was then an 11.5 year absence. The Tribunal had held that the employer had breached the Ontario *Human Rights Code* in failing to take reasonable steps to accommodate the employee's disability following a lengthy sick leave.[1] The Divisional Court dismissed the employer's application for judicial review in September 2014.

On May 31, 2016, the Ontario Court of Appeal dismissed the employer's appeal of the Divisional Court's judgment: see *Hamilton-Wentworth District School Board v. Fair*, 2016 ONCA 421.[2]

In rejecting the employer School Board's appeal, the Court found that the Tribunal's determinations both with respect to the failure to accommodate and the remedy of reinstatement were reasonable. On the failure to accommodate to the point of undue hardship, the Court stated that the Tribunal's decision was "fact-driven and one that it was entitled to make based on the evidence before it". As for the remedy, while noting that reinstatement is rarely used in the human

[1] See "Beware a failure to accommodate: employee ordered reinstated with back pay after an 11.5 year absence," *Employment and Labour Bulletin*, April 2013: www.mcmillan.ca/beware-a-failure-to-accommodate-employee-ordered-reinstated-with-back-pay-after-an-115-year-absence.

[2] www.ontariocourts.ca/decisions/2016/2016ONCA0421.pdf.

rights context, the Court found that the Tribunal has broad remedial authority under the Code as well as "specialized expertise" that "is accorded a high degree of deference". The passage of several years was found not to be determinative in itself. The decision as to whether reinstatement ought to be ordered is "context-dependent". In this case the employment relationship was not fractured nor had the delay materially affected Fair's capabilities, in the Tribunal's view.

Of particular interest was the Court's comment that in an appropriate case an employer may be obliged to place a disabled employee in a position for which the employee "is qualified but not necessarily the most qualified". It favourably cited a 1991 grievance arbitration decision, noting that the employer's obligation to accommodate under the Code prevailed over the seniority rights of the grievor who was competing for a vacant position.

Absent a successful application for leave to appeal to the Supreme Court of Canada (there has been no indication as yet by the School Board of such intention), Fair will be reinstated and receive hundreds of thousands of dollars in back pay and interest, along with other material monetary payments, following what is now a 14 year absence.

What Employers Should Know

This decision makes it clear that Ontario courts will give Tribunal decisions great deference. Further, the Tribunal's remedial authority is extremely broad and it includes potential reinstatement where circumstances warrant.

As the Tribunal said in its original decision, the duty to accommodate should be addressed "actively, promptly and diligently". When assessing a genuine accommodation request, an employer must proceed in good faith and consider all reasonable steps including modifications to the employee's position (or other conditions of employment depending on the nature of the request) or looking for alternative jobs if the original position cannot be modified without undue hardship. This is a serious and sometimes tricky business and ought to be treated as such. It is a process that usually involves significant consultation and certainly detailed documentation. While the delay in the *Fair* case was anomalous, depending on the complexity of the situation an employer should not hesitate to seek input from its legal advisors or risk exposure to significant liability.

EMPLOYER PAYS FOR SHODDY WORKPLACE INVESTIGATION

— James D. Kondopulos and Andrew Eyer of Roper Greyell LLP. © 2016 Roper Greyell LLP—Employment + Labour Lawyers.

It was impossible for Mr. Lau to deal with the allegations against him. It was impossible for him to properly defend himself, because from the outset the bank believed that the client told the truth and Mr. Lau did not. RBC ... failed to meet their implied obligations of good faith and fair dealing.

Lau v. Royal Bank of Canada, 2015 BCSC 1639, per Loo J at para. 219.

Overview

The Supreme Court of British Columbia's decision in *Lau v. Royal Bank of Canada*, 2015 BCSC 1639, provides a reminder of the crucial importance of conducting a fair, objective, and thorough workplace investigation, especially where dishonesty or fraud is alleged.

An investigative stitch in time could well have saved the employer in this case nine months' worth of damages for failure to provide termination notice, $30,000 in aggravated damages, and costs.

Facts

On January 27, 2012, Marco Lau met with a Cantonese-speaking client in his office. The client agreed to modify the way her bank holdings would be invested. Contrary to bank policy, Lau processed the transaction as new money instead of retained money.

Several days later, the client filed a complaint about the transaction. RBC's corporate investigation services ("CIS") team was called in.

Lau immediately acknowledged that he had tracked the sale improperly. He, however, claimed that he had followed the instructions of a colleague, Anson Tse, who Lau suggested had also been at the meeting with the client. Lau apologized for the tracking problem.

It was later uncovered that several other members of the branch had also been improperly tracking their sales data. Many of them said that Tse had coached them in this respect.

The issue of who had been in attendance at the initial client meeting became complicated. The client said she had met only with Lau. Tse initially said he was at the meeting but later changed his story to say that he had not been there. Lau was steadfast in maintaining that Tse was at the meeting. There was also video surveillance footage which supposedly showed Tse did not at any point enter Lau's office.

On the basis of the CIS investigation, the bank discharged Lau from his employment for what it said was just cause. It also submitted a report to the British Columbia Securities Commission pursuant to its statutory obligation. In the report, the bank stated:

> The termination was a result of [Lau's] falsification of bank records and failing to tell the truth when questioned regarding an alleged joint session with a client. In particular, he claimed existing money as new to bolster his sales, and maintained that he participated in a joint session with a client despite evidence to the contrary.

Lau had been with his employer for five years at the time of termination of his employment. Following his dismissal, he tried unsuccessfully to obtain employment with several different banks.

Decision

Supreme Court of British Columbia Justice Linda Loo concluded that there was not just cause for termination of Lau's employment. She took into consideration factors including the plaintiff's immediate acknowledgment of wrongdoing and his "unblemished" employment record.

With respect to the bank's investigation into who had attended the meeting, Madam Justice Loo identified a laundry list of flaws:

- The video surveillance footage which was said to be "conclusive" was not at all conclusive. The surveillance footage from the day in question was in fact not available at trial.
- The bank produced no copy of the recorded interview between CIS and Lau. The one CIS interviewer who was called as a witness at trial had little independent recollection of the interview.
- The complaint of the client was made orally in Cantonese to a translator. The translator relayed the information to a representative of the bank. CIS accepted the representative's report as accurate in its totality and did not investigate the client's complaint any further. The client did not testify.
- Lau was never given an opportunity to view the video or respond to it. This was in spite of asking to see it. He was never told that Tse admitted to not being at the meeting and, in addition, never had the client's statement put to him.

For these reasons, Madam Justice Loo found Lau had been wrongfully dismissed from his employment. She further found that he had been dismissed in circumstances which "made it virtually impossible for him to find employment" because "[m]ost, if not all, employers want an employee who tells the truth".

Interestingly, the judge also awarded Lau an additional $30,000 in aggravated damages. Despite the fact that there was no medical evidence before the Court to support a claim for aggravated damages, the judge was of the view that she did "not need medical evidence to prove that a false accusation of failing to tell the truth which is published can lead to mental distress".

Conclusion

This decision serves as a sobering reminder that a shoddy workplace investigation can lead not only to a finding of wrongful dismissal but also to an award of aggravated damages (and perhaps punitive damages) as well as costs.

Here are some helpful pointers when conducting a workplace investigation:

- Inform the employee under investigation of all allegations against him or her. This is a matter of fairness. It gives the employee the opportunity to hear the allegations and tell his or her side of the story.
- Gather and weigh all material evidence and be sure to interview all relevant witnesses, even if it means meeting with multiple individuals.
- Keep detailed, accurate records of investigative interviews. In appropriate circumstances, consider asking the witness being interviewed to review and sign any statement that he or she has provided.
- Make the necessary credibility assessments, remaining mindful of the possibility of fabrication, motive, and the inherent dangers associated with hearsay evidence.
- Perhaps most importantly, use a skilled workplace investigator from inside your organization or even outside it and, where necessary or appropriate, consider retaining reputable legal counsel to conduct the investigation.

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PROGRESS OF LEGISLATION

Federal Bill that Would Establish Labour Relations Regime to Members and Reservists of the RCMP Progresses Through Senate

Bill C-7, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures*, received third reading in the Senate on June 21, 2016.

If passed, Bill C-7 would amend the *Public Service Labour Relations Act* (the "PSLRA") to establish a labour relations regime applicable to members of the Royal Canadian Mounted Police (the "RCMP"). Bill C-7 is the federal government's response to the Supreme Court of Canada's 2015 decision in *Mounted Police Association of Ontario v. Canada (AG)*, 2015 CLLC ¶ 220-010, in which a majority of the Court determined that the existing regime that prohibited RCMP members from unionizing or engaging in collective bargaining under the PSLRA was unconstitutional.

For a more detailed discussion of Bill C-7's amendments, see *Labour Notes* no. 1543, dated March 30, 2016.

Bill C-7 received first reading in the House of Commons on March 9, 2016, second reading on March 24, and third reading on May 30. It received first reading in the Senate on May 31 and second reading on June 2.

Alberta Announces Three-Step Plan To Implement $15 Minimum Wage

In a June 30, 2016 announcement, the Government of Alberta outlined its plan to increase the province's minimum wage rate to $15 per hour by 2018.

The general minimum wage rate, currently $11.20 per hour, will increase as follows:

- to $12.20 per hour, effective October 1, 2016;
- to $13.60 per hour, effective October 1, 2017; and
- to $15.00 per hour, effective October 1, 2018.

In addition, the weekly rate for salespersons and land agents (currently $446 per week) and the monthly rate for domestic workers (currently $2,127 per month) will increase to $486 and $2,316, respectively, on October 1, 2016. These rates will also increase in 2017 and 2018 by an amount proportional to the general rate increase.

The special rate for liquor servers will be removed effective October 1, 2016.

New Brunswick Amends its *Employment Standards Act*

An Act to Amend the Employment Standards Act, SNB 2016, c. 20 (formerly Bill 30), has received Royal Assent.

Effective June 28, 2016, the *Employment Standards Act* was amended to increase the maximum amount of compassionate care leave available to employees from eight weeks to 28 weeks. In addition, effective January 1, 2017, further amendments will:

- specify that, where an employer provides an employee's statements of wages electronically, it must provide the employee a means of making a paper copy of the statement at the employee's place of employment; and
- remove the obligation to retain records pertaining to employees' living allowances, and add an obligation to keep records of the date of cessation of an employee's employment for at least 36 months.

Bill 30 was first introduced on March 29, 2016. It received second reading on April 7, third reading on May 18, and Royal Assent on June 28.

Quebec Adds Gender Identity and Expression as Prohibited Grounds of Discrimination

Effective June 10, 2016, Quebec's *Charter of Human Rights and Freedoms* was modified to expressly include gender identity and expression among the prohibited grounds of discrimination. The amendment was part of *An Act to strengthen the fight against transphobia and improve the situation of transgender minors in particular*, SQ 2016, c. 19 (formerly Bill 103), which was introduced on May 31, 2016 and received Royal Assent on June 10.

Quebec is the ninth jurisdiction to expressly enumerate gender identity as a prohibited ground of discrimination in its human rights legislation. Gender identity is currently specifically protected in Alberta, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan, and Northwest Territories. In addition to Quebec, a separate ground of gender expression is also protected in Alberta, Newfoundland and Labrador, Nova Scotia, Ontario, and Prince Edward Island.

Saskatchewan Minimum Wage To Increase October 1

Effective October 1, 2016, Saskatchewan's minimum wage rate will increase from $10.50 per hour to $10.72 per hour.

Saskatchewan's minimum wage is adjusted on October 1 of each year in accordance with a formula based on changes in the province's Consumer Price Index and the average hourly wage.

DID YOU KNOW ...

... That the Federal Government Is Developing Accessibility Legislation?

The Government of Canada recently announced that it is committed to developing new accessibility legislation that will "promote equality of opportunity and increase the inclusion and participation of Canadians who have disabilities or functional limitations." The proposed legislation is intended to prevent and remove barriers that impede Canadians with disabilities' ability to participate equally in their communities and workplaces.

A national consultation will run from July 2016 until February 2017, which will include online consultations as well as in-person engagement sessions. All Canadians are encouraged to provide their ideas for the development of the legislation, including:

- feedback on the overall goal and approach;
- whom it should cover;
- what accessibility issues and barriers it should address;
- how it should be monitored and enforced;
- when or how often it should be reviewed;
- how and when to report to Canadians on its implementation; and
- how to more generally raise accessibility awareness and support organizations in improving accessibility.

Visit www.canada.ca/Accessible-Canada for more details.

RECENT CASES

Employee's Misconduct Was Not Serious Enough To Amount to Just Cause

Ontario Divisional Court, February 16, 2016

Garreton worked for Complete Innovations Inc. ("CI") for six months on contract, prior to being hired as a full-time trainer with a written contract of employment. The termination provision of her contract provided for one week of notice for up to one year's employment, two weeks' notice for one to three years, and a further week's notice for each additional year of service, up to a maximum of eight weeks' notice. Two years after being hired full-time, Garreton was leading an internal training session when an employee, who was not part of the training session, went to take a bagel, and Garreton asked her to wait until the attendees had obtained their food. When the employee grabbed a bagel, Garreton grabbed her wrist. The employee swore, took the bagel, and reported Garreton to the CEO. Garreton was suspended for two days. On her return to work, Garreton was terminated for the bagel incident as well as two earlier incidents for which she had received a written warning. At Small Claims Court, the trial judge found that Garreton had been dismissed without cause and awarded her five months' reasonable notice. CI appealed.

The appeal was dismissed. The trial judge erred in failing to deal with the issue of whether the employment agreement was enforceable. While the employment agreement provided for the same notice period as section 57 of the *Employment Standards Act, 2000* (the "Act") for employees such as Garreton, the pay in lieu of notice was limited to a maximum of eight weeks, which was contrary to the severance pay provisions of the Act. Therefore, the contract terms dealing with termination were void and unenforceable. The trial judge did not err in finding that CI did not have just cause to termination Garreton. The bagel incident did not amount to "workplace violence", and CI could not terminate Garreton after having suspended her for the same incident. In addition, the trial judge considered each other incident relied upon by CI, and determined that they were not serious enough to amount to just cause.

Garreton v. Complete Innovations Inc., 2016 CLLC ¶ 210-032

Employee Who Was Fired after Being Arrested and Charged with Two Counts of Sexual Assault against Minors Was Wrongfully Dismissed

Ontario Superior Court of Justice, February 19, 2016

Merritt worked for Tigercat Industries Inc. ("Tigercat") as a labourer. He had worked for Tigercat for 17 years, although he had been laid off and rehired twice during those years, once for two years and once for eight months. Since his most recent return to work, he had been warned about calling in sick when his daughter had a baby, warned and then suspended for two incidents involving a load rolling off a trailer, and suspended for one day for backing into a vehicle. Merritt was arrested at work and charged with two counts of sexual assault against minors. The next day, in a meeting with Tigercat, Merritt refused to discuss any details of the charges, saying only that they did not involve employees of Tigercat. Merritt was presented with a letter of resignation, which he refused to sign, and he was placed on a two-week leave of absence. On the day he returned to work, he was assigned to fill a vacancy at a different plant and, a few hours into his shift, a female employee complained about having to work with Merritt, since he had allegedly made inappropriate and sexual comments to her three years ago. Tigercat fired Merritt for cause later that day, allegedly for dishonesty, past misconduct, and the impact of his criminal charges. Merritt brought an action for summary judgment for wrongful dismissal, as well as an action against Tigercat's vice-president.

The wrongful dismissal action was allowed and the action against the vice-president was dismissed. Tigercat did not undertake any investigation into the charges laid against Merritt in order to support termination for cause. There was no evidence of damage, or potential damage, to Tigercat's reputation from Merritt's criminal charges. The female employee who complained about Merritt was not involved in the criminal case, and Tigercat had a duty to accommodate both her and Merritt, without resorting to dismissal. Merritt was not obliged to disclose the criminal allegations to his employer; since the investigation was ongoing, Merritt was entitled to be presumed innocent and had the right to silence. There was no evidence that the charges involved anyone at Tigercat, nor was there evidence that Merritt knew that the female employee worked for Tigercat until he was transferred to the plant. Further, termination based on Merritt's discipline record was improper and disproportionate to the incidents, which had all been resolved. Therefore, Merritt was dismissed without cause and was entitled to reasonable notice. Taking into account the two layoffs, Merritt had worked for Tigercat for 12 years and 5 months. He was 66 years old at the time of his termination, and it was unlikely he would obtain similar employment. He was awarded 10 months' reasonable notice. There was no merit to the claim against the vice-president of Tigercat, as he was acting in his capacity as an officer and employee of Tigercat when he terminated Merritt and there was no evidence that he acted outside the scope of his employment.

Merritt v. Tigercat Industries Inc., 2016 CLLC ¶ 210-033

Football Player's Civil Action Alleging that Football League Failed To Treat His Concussion Was without Jurisdiction

Supreme Court of British Columbia, March 11, 2016

The Canadian Football League Players' Association ("CFLPA") was the bargaining agent for professional football players in the Canadian Football League ("CFL"). Under the collective agreement, the CFLPA negotiated on behalf of all players. The Canadian Football League Player Relations Committee ("CFLPRC") was the collective bargaining representative for all teams in the CFL. Bruce was a CFL player for 13 years, and a member of the CFLPA. He brought a civil action claiming he was knocked unconscious and suffered a concussion while playing a football game for the BC Lions, and sustained multiple subconcussive and concussive hits in a later game. He further claimed that the Montreal Alouettes allowed him to play the next year, even though he displayed the ongoing effects of a concussion to their medical professionals and coaching staff. The CFLPRC and the Commissioner of the CFL contended that the allegations arose from Bruce's employment with the BC Lions and the Montreal Alouettes, and were subject to the grievance and arbitration process set out in the collective agreement. All of the defendants to the action brought applications to strike the civil claims as being without jurisdiction.

The applications were allowed, and the claims were struck. Bruce benefited from the efforts of the CFLPA and the collective agreement it negotiated on behalf of all CFL players. In exchange, he gave up his common law right to commence proceedings related to matters arising either expressly or inferentially under the collective agreement. The

players' entitlement to bargain for personal compensation or certain other terms of their player contracts was a delegation of certain issues from the CFLPA, and did not leave the CFLPA with less than exclusive bargaining rights for players. The collective agreement clause dealing with player safety indicated that disputes "may be submitted to arbitration". However, the arbitration clause required parties to submit disputes to arbitration. In addition, "strangers" to a collective agreement, such as the CFL Alumni Association, Tator, Ezerins, and the Krembil Neuroscience Centre, were subject to the arbitral process even if they were not agents to parties to the agreement and owed independent duties to the employer. The dispute was within the collective agreement. The essential character of the dispute was not compensation, but health and safety. At issue was whether the CFL took steps to ensure Bruce's health and safety while he played, which arose from the collective agreement. It allowed for effective redress for any workplace injuries Bruce may have sustained, and he was still arguably eligible to file a grievance. Therefore, the disputes raised by Bruce arose from the collective agreement and could only be resolved through the grievance and arbitration process.

Bruce v. Cohon, 2016 CLLC ¶ 220-031

Motions Judge Did Not Err in Concluding that Employee Had No Standing To Challenge Arbitrator's Decision

Ontario Divisional Court, April 1, 2016

After Misra was terminated from his employment with the City of Toronto ("Toronto"), the Canadian Union of Public Employees Local 79 (the "union") brought several grievances on his behalf. Two years after the hearing ended, the arbitrator issued a "bottom line" decision ordering Misra be reinstated without loss of seniority, although he was denied compensation for lost wages. After numerous requests for the full reasons, the union filed an application for judicial review and requested an order directing the arbitrator to issue her full reasons. Four months later—three years after the conclusion of the arbitration—the arbitrator's full decision was released. It set out that compensation was denied because the case was "close to the line", discharge was within the range of reasonable disciplinary responses, and Misra's evidence was not credible. When the union decided not to seek an application for judicial review, Misra sought standing to bring his own application for judicial review of the arbitrator's decision. Toronto and the union brought a motion challenging the standing of Misra to bring the application for judicial review. The motion was granted, and the application for judicial review was quashed (see 2016 CLLC ¶ 220-029). Misra brought an application to vary the decision of the motions judge.

The application to vary was dismissed. The union had exclusive jurisdiction over the grievances, which were the subject of arbitration. It was not until after the bottom line award was released that Misra indicated for the first time that he wanted compensation in lieu of returning to work. After the final arbitration award was released, the union was advised that either the findings of fact would be upheld, and there would be no reason to grant back pay, or the findings of fact would be struck down and the matter would have to be looked at anew. The union reasonably relied on this legal advice in deciding not to pursue judicial review. The decision to dismiss Misra's complaint on the basis that the union took all reasonable steps to obtain the arbitrator's reasons, and the union's reliance on its legal opinion, was reasonable. The motions judge did not err in finding Misra did not have standing to challenge the arbitrator's decision.

Misra v. Toronto (City), 2016 CLLC ¶ 220-032

Court of Appeal Affirms that Rollback of Wage Increase Pursuant to *Expenditure Restraint Act* Did Not Violate Charter

British Columbia Court of Appeal, April 13, 2016

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, along with wage increases from 2006 to 2009 which were within the limits subsequently enacted by the *Expenditure Restraint Act* ("ERA"). After the arbitration board's decision was issued, the ERA came into force, which restricted compensation increases, starting with the 2006/2007 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. An appeal was dismissed, as the Court found that the nullification of the 2006 wage increase was not an impermissible interference with the protected process of collective bargaining (see 2013 CLLC ¶ 220-056). The Supreme Court of Canada directed the Court of Appeal to reconsider its decision in light of *Meredith v. Canada (AG)*, 2015 CLLC ¶ 220-010 ("*Meredith*"), and *Mounted Police Association of Ontario v. Canada (AG)*, 2015 CLLC ¶ 220-011 ("*MPAO*"), which found that the ERA did not infringe paragraph 2(*d*) as it applied to the RCMP.

The appeal was dismissed. The threshold for unconstitutionality of public sector wage restraint was one of "substantial interference". The current situation and the *Meredith* case involved wage rollbacks under identical legislation. Applying the broad principles articulated by the Supreme Court of Canada in *Meredith* and *MPAO* to the facts of this case would not lead to a different result. In this situation, the hard-won wage increase was subjectively important to the Council, but the rollback of this single wage increase did not undermine the capacity of the union to collectively and effectively pursue its goals, and the Council was able to successfully negotiate a subsequent collective agreement. The government attempted to negotiate until the last moment, and indicated to the Council as early as possible the potential effects of the impeding legislation, which was a proportional response to the fiscal crisis. The ERA did not significantly impair or undermine the associational goals of the Council. Therefore, the summary judge did not err in finding that the level of interference was not constitutionally impermissible.

Federal Government Dockyard Trades and Labour Council v. Canada (AG), 2016 CLLC ¶ 220-033

Job Applicant's Religious Beliefs Were a Factor in Employer's Decision To Reject Her Employment Application

British Columbia Human Rights Tribunal, March 2, 2016

Paquette attended Trinity Western University ("TWU"). She signed the "Community Covenant", which was a code of conduct embodying TWU's evangelical Christian religious values, including the recognition that same-sex couples were contrary to biblical teaching and were morally unacceptable. While at TWU, Paquette served in a number of paid positions that required her to recommit to the Community Covenant. After graduating, she applied for a position with Amaruk Wilderness Corp. ("Amaruk") as an assistant guide intern, to work as a raft guide. In response to her application, Paquette received an email from Amaruk stating that Paquette did not meet the minimum requirements for the position, and noting that Amaruk may not be the right place for her considering she went to TWU and Amaruk was not a Christian organization. A number of emails were exchanged, which addressed the Norse views of Amaruk and were critical of the Christian views of Paquette. Paquette brought a human rights complaint alleging discrimination on the basis of ancestry, religion, and political belief.

The complaint was allowed. Paquette was Christian and obtained her degree from TWU, which was an evangelical Christian-based university. She applied for and was denied employment with Amaruk. The initial email to Paquette indicated that she did not meet the minimum requirements for the advertised position, although it also took issue with the principles of TWU and with Christianity generally, which implied that Paquette's religious beliefs were a factor in rejecting her employment application. Further emails from Amaruk reinforced that TWU followed religious beliefs that were not acceptable to Amaruk. The emails constituted religious harassment of Paquette. The Tribunal declined to determine whether the emails were an attack on political beliefs, and the emails did not constitute discrimination on the ground of ancestry. The Tribunal, which had jurisdiction over the dispute, determined that Paquette established a *prima facie* case of discrimination, which both Amaruk and the director of Amaruk failed to rebut. Since Paquette did not possess the qualifications set by Amaruk to apply for an internship position, no wage loss was awarded. The harassment endured by Paquette through the emails was egregious, although it only occurred over four days in total, and thus she was awarded $8,500 for injury to dignity and self-respect.

Paquette v. Amaruk Wilderness Corp., 2016 CLLC ¶ 230-023

Employment Insurance Claimant Failed To Provide Documentation To Prove that She Did Not Misrepresent Her Earnings

Federal Court, February 15, 2016

Auch received maternity and parental benefits from June 3, 2007 to May 17, 2008. Three years later, which was outside the 36-month limitation period for reconsidering benefits, the Canada Employment Insurance Commission (the "Commission") became aware that Auch had declared self-employment earnings of $90,000 for 2008 and requested information from Auch regarding these earnings, which request Auch did not receive since she had moved. Having received no information from Auch, the Commission determined that Auch had made a false or misleading statement because her earnings had not been reported while she was in receipt of benefits, which extended the limitation period for reconsidering benefits. It issued a notice of debt for the overpayment. When Auch became aware of this, she claimed that the business income she received as a real estate agent in 2008 was earned after her maternity leave, although she did not provide any supporting documentation. She filed a request for reconsideration of the overpayment, which was denied since no documentation was provided to prove that she did not generate earnings while in receipt of benefits. Auch brought an appeal before the General Division of the Social Security Tribunal ("SST"), which was dismissed. Her application for leave to appeal was dismissed by the Appeal Division of the SST. Auch brought an application for judicial review.

The application for judicial review was dismissed. The Court was satisfied that Auch did not report the earnings from 2008 because they were from work performed outside of the benefits period, and that she did not submit any information initially because she had moved and had not received the Commission's communications. The decision by the Commission to find that Auch had made false or misleading statements was therefore procedurally unfair, unreasonable, and beyond the limitation period. However, when Auch became aware of what had happened, she informed the Commission that the business income was earned after the expiry of her maternity leave, but did not provide any documentation to corroborate her account. She was fully informed that she needed to provide supporting, corroborating documentation, and she failed to do so. While she did not receive earnings during the benefit period and did not misrepresent this to the Commission, she failed to demonstrate that the decision of the Appeal Division of the SST was procedurally unfair or unreasonable. She did not provide the requested documentation, and did not provide a convincing explanation as to why she did not, or could not, provide the documentation.

Auch v. Canada (AG), 2016 CLLC ¶ 240-002

THE ECONOMY

The statistics below provide a convenient overview of the latest Consumer Price Index (CPI) and other economic and labour indicators of interest. Do you need detailed CPI figures for all of Canada, individual provinces, regional cities, or specific goods and services (e.g., housing, food, and transportation)? If so, you can find the detailed CPI figures in the "Consumer Price Index" tab division of Volume 1 at ¶ 26 *et seq*.

Cost of Living — *Up*

The Consumer Price Index figure for May 2016 on the 2002 = 100 time base, was 128.8, up 1.5% from the May 2015 figure of 126.9. On a monthly basis, the May 2016 percentage figure was up 0.4% from April 2016. On the 1992 = 100 time base, the May 2016 All-Items figure was 153.3.

Industrial Production — *Up*

The preliminary, seasonally adjusted figure of industrial production for the month of April 2016, in chained 2007 dollars, was estimated at $350,067 million, up 0.9% from the revised April 2015 figure of $346,781 million.

Weekly Earnings — *Up*

In April 2016, the average weekly earnings (including overtime), seasonally adjusted at the industrial aggregate level were $955.67, up 0.2% from $953.67 in April 2015, according to a preliminary estimate based on a sample survey of reporting units.

Unemployment — *Down*

For May 2016, the seasonally adjusted number of unemployed persons totalled 1,346,500, down 36,700 from April 2016, with an unemployment rate of 6.9% of an active labour force of 19,401,700. The employment level in May 2016 was 18,055,200.

Work Stoppages — *Down*

For major collective bargaining agreements (those with 500 or more employees) in May 2016, there were 4,940 person days lost from 7 work stoppages. For May 2015, there were 130,130 person days lost from 71 work stoppages.

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