Labour & Employment Law Highlights from 2017

Description

As usual, 2017 was a year filled with interesting labour and employment law developments. What follows are a few of the highlights from a Manitoba perspective.

Further clarification/confusion related to the jurisdiction of labour arbitrators and human rights commissions: In 2017, the Manitoba Court of Appeal released its decision in *Northern Regional Health Authority and Manitoba Human Rights Commission.*

The genesis of this case is long and complex. The employment of a unionized employee had been terminated for reasons which were connected to alcohol addiction (a protected disability under *The Human Rights Code*) and the employee filed a complaint with the Manitoba Human Rights Commission. After a hearing, the Commission held that the employer had failed in its duty to accommodate, reinstated the employee, and granted a substantial damage award.

In 2016, the Manitoba Court of Queen's Bench overturned the Human Rights Adjudicator's decision and held that the complaint was within the exclusive jurisdiction of a labour arbitrator. This decision was, in turn, appealed to the Manitoba Court of Appeal, which allowed the appeal on jurisdiction and remitted the case back to the reviewing judge to decide the issues on the merits. The Court of Appeal held that the employee had an individual right under *The Human Rights Code* to pursue her complaint, although the Court did place significant limitations on the jurisdiction of the Human Rights Adjudicator in the circumstances of the matter.

The jurisdiction issue may not be resolved — leave has been sought to appeal this decision to the Supreme Court of Canada. If leave is granted, the Supreme Court may provide clarification regarding exclusive and concurrent jurisdiction in the human rights context.

Wage restraint in the public sector: On March 20, 2017, Manitoba's provincial government introduced *The Public Services Sustainability Act* ("Bill 28"). Bill 28 places limits on public sector wage increases over a four year sustainability period. This legislation impacts both unionized and non-unionized employees. It provides that, where cost savings can be identified in collective bargaining, those increases can be passed along to employees. A consortium of public sector unions have filed an action challenging the constitutionality of Bill 28 and is seeking an injunction to prevent its implementation.

Bill 28 received Royal Assent on June 2, 2017, but has not yet been proclaimed as of the date of this summary.

Changes to the collective bargaining scheme in Manitoba's health care sector: Concurrent with the introduction of Bill 28, Manitoba's provincial government introduced *The Health Sector Bargaining Unit Review Act* ("Bill 29"). Bill 29 changes collective bargaining in the health care sector by establishing employer organizations for each health region for the purposes of collective bargaining and establishing a fixed number of bargaining units for each health region and two designated

province-wide employers. A commissioner will be appointed by the Government to facilitate the process and to determine the composition of each bargaining unit.

As with Bill 28, Bill 29 received Royal Assent on June 2, 2017 but has not yet been proclaimed.

Changes to the minimum wage: On June 2, 2017, Manitoba's provincial government passed *The Minimum Wage Indexation Act*. This legislation amended *The Employment Standards Code* to index Manitoba's minimum wage to the annual inflation rate in the Province. On October 1 of each year, the new minimum wage will be calculated in accordance with the formula now contained within *The Employment Standards Code.* Pursuant to these changes, Manitoba's minimum wage was increased to $11.15 on October 1, 2017.

Accessibility standards: November 1, 2017 was the deadline for public sector organizations to comply with the new accessibility standards set out in *The Accessibility for Manitobans Act* (the "*AMA* "). All private sector organizations and non-profits are required to be compliant with the legislation by November 1, 2018.

These standards require that all Manitoba organizations with at least one employee:

- address physical barriers that prevent customers from receiving service;
- meet the communication needs of clients;
- allow service animals;
- allow assistive devices, such as wheelchairs, walkers and oxygen tanks;
- let customers know the accessibility policies and procedures;
- let customers know when accessible services are not available;
- invite customers to provide feedback; and
- train staff on accessible customer service, including reasonable accommodations under *The Human Rights Code*.

It is recommended that all private sector and non-profit organizations in Manitoba take steps now to ensure that they will be compliant by November 1, 2018.

Progress towards the legalization of cannabis: The federal government moved forward with plans to legalize cannabis in Canada. While specific dates and details are not yet finalized, it appears probable that cannabis will be legal in Canada sometime this summer.

The legalization of cannabis presents a number of concerns for employers, and it is important that employers ensure that they are adequately prepared for the possible impacts of legalization. Drug and alcohol policies should be reviewed and amended. Similarly, employers (especially those in safety sensitive environments) may wish to consider proactively training supervisors and managers on how to identify signs of impairment and address potential issues.

Employees and employers alike should be aware that the coming legality of cannabis does not mean that employees will be entitled to use cannabis while in the workplace or to work while under the influence of cannabis. As with alcohol, employers are entitled to implement policies and rules regarding prohibitions on the possession and use of cannabis.

It is also important that human resources professionals, managers, and supervisors understand the

distinction between recreational cannabis use and circumstances in which the employee is using cannabis for medicinal reasons related to a disability. Where an employee is disabled (or may have an addiction), employers must be cognizant that they may have a duty to accommodate and ensure that any policies or steps taken are compliant with human rights legislation.

Expansion of human rights coverage in the employment context: On December 15, 2017, the Supreme Court of Canada released its decision in *Schrenk v. British Columbia Human Rights Tribunal.* The majority of the Supreme Court held that British Columbia's human rights legislation prohibits discrimination "regarding employment" regardless of the identity of the perpetrator. This decision opens the door for complaints alleging discrimination in employment even when the complainant has no actual employment relationship with the respondent.

The language considered by the Supreme Court in this decision is similar to the language contained in *The Human Rights Code* of Manitoba. As a result, this decision may have similar implications for Manitoba employers.

Surprising mitigation considerations: In 2017, the Ontario Court of Appeal considered the issue of mitigation in *Brake v. PJ-M2R Restaurant.* In this decision, a long-service employee was told by her employer that she was required to accept a demotion or her employment would be terminated. She declined to accept the demotion and her employment was subsequently terminated. The employee searched for new employment, but was only successful in finding employment which was substantially inferior to her previous position. She sued her former employer for constructive dismissal.

The Ontario Court of Appeal outlined a number of principles with regard to mitigation of damages, some of which may be surprising to employers and employees. First, income earned during the statutory entitlement period should not be deducted from an award of damages. Second, income earned from another job which was held concurrently with the position from which the employee was terminated should not be included as mitigation. Third, where an employee is forced to accept substantially inferior employment, wages earned in that position may not be deemed to be mitigation earnings.

If this decision is followed in Manitoba, it will have serious implications for employers and employees with regard to mitigation of damages.

Huge damages awarded – a reminder to treat employees reasonably: At the end of 2017, the Ontario Superior Court released a decision in which an employee was awarded precedent setting figures in moral and punitive damages. In *Galea v. Wal-Mart Canada Corp.,* the employee was a senior level manager who was, from all indications, considered to be a star employee until she was suddenly removed from her position.

While not immediately terminated, she was not reassigned to a new full-time position and the employer's conduct, both before and after termination, was deemed to constitute a breach of the implied duty of good faith. The Court held that the employer had, effectively, entered into a campaign aimed at denigrating the employee to the point where the employee would resign.

In addition to a large sum of damages for breach of contract, the Court awarded $250,000 in aggravated and moral damages, and $500,000 in punitive damages. Notably, the Court also held that the employee was not required to provide medical evidence to make out a claim for mental distress in

Ontario.

While Manitoba has never seen the likes of these types of numbers, this case serves as an important reminder to all employers that it is imperative that they treat employees reasonably at every stage of the employment relationship.