# Labour & Employment Law Highlights from 2016

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Labour and employment law had some interesting developments in 2016. What follows are a few highlights from the last year and an introduction to an issue that may attract significant attention in 2017.


**The Supreme Court says no to without cause dismissals in the federal sector:** In *Wilson v. Atomic Energy of Canada Ltd* **[1]**.,the Supreme Court of Canada held that federally regulated employees cannot be dismissed without just cause. Prior to *Wilson*, there were two diverging sets of authority as to whether a federally-regulated employer could dismiss a non-unionized employee without cause, with notice or compensation in lieu of notice. *Wilson* ended the debate and now, in effect, employees who fall under the unjust dismissal provisions of the *Canada Labour Code* have similar protections to those of unionized employees. A dismissed employee can pursue a complaint under the *Canada Labour Code* even if the employee received notice of the termination or compensation in lieu of notice. This serves as an additional reminder that employers should be diligent in documenting all employee misconduct and applying progressive discipline prior to termination to ensure that there is a sufficient evidentiary record to support a with cause dismissal when circumstances warrant.

**The potential pitfalls of fixed-term contracts:** In *Howard v. Benson Group Inc. (The Benson Group Inc.)* ***[2]***, the Ontario Court of Appeal ordered an employer to pay a former employee 37 months of salary and benefits following termination - after only 23 months of employment. The Court of Appeal held that when the employer terminated a fixed term employment contract, without cause, and there was no enforceable provision for early termination without cause, the employee was entitled to the compensation that he would have received to the end of the employment contract. Additionally, the Court held that the employee had no duty to mitigate his damages. Leave to appeal the decision to the Supreme Court was dismissed in October. For a more fulsome review of the decision and its lessons for employers, please see: ***The Potential Pitfalls of Fixed-Term Employment Contracts*** by Terra Welsh.

**No more automatic certifications in Manitoba:** In November, the Manitoba government changed the certification process for forming a new bargaining unit. Prior to November, if a union was able to gather at least 65% support from within the proposed bargaining unit, no vote of the proposed members was required and the Labour Board automatically certified the unit. If a proposed bargaining unit had between 40% and 65% support, a vote was required.

Now, the minimum threshold of 40% remains, but a certification vote by secret ballot is required regardless of the amount of support.

**The Manitoba Human Rights Commission continues the upward trend in damage awards:** While the MHRC is certainly not at the levels of the human rights commissions in British Columbia or Alberta, most recently, in *Jedrzejewska, Chaudhry, and Chaudhry v. A+ Financial Services Ltd and Wayne McConnell*, three complainants who were subjected to workplace harassment were each awarded $20,000 as damages for injury to dignity, feelings and self-respect. This presents a considerable escalation when considered in the context of the high-water marks of $7,750 in 2013 and $15,000 in 2014.

**New leaves under *The Employment Standards Code*:** There were some significant amendments to the Code in 2016 relating to the addition of long-term leave for serious injury or illness, the extension of compassionate care leave, and the addition of domestic violence leave.

**Not an employee or an independent contractor? Dependent contractor it is!** In *Keenan v. Canac Kitchens Ltd*.**[3]**, the Ontario Court of Appeal considered the appropriate notice period for a married couple where the husband worked for 32 years and the wife worked for 25 years for Canac Kitchens. In 1987, eleven years after the husband had been employed by Canac Kitchens, the company informed the couple that they were changing their relationship from employees to contractors. They were required to devote their full time and attention to Canac and did so until 2006. In 2007, the Keenans started doing some work for a competitor of Canac, because Canac was providing less work. Canac ended the relationship in 2009 and provided no notice or payment whatsoever. The Court of Appeal concluded that the Keenans were “dependent contractors” because of the exclusivity of the relationship and, therefore, they were entitled to notice of the termination of their engagement. The Court found that exclusivity is to be determined by looking at the entire relationship between the parties and the Keenans’ recent work from an alternate source was insufficient to displace the average 28.5 years of service the Keenans had provided. The Keenans were awarded pay in lieu of 26 months of notice.

**Marijuana in the workplace:** The potential legalization of marijuana in 2017 will likely add an additional challenge to the already complex area of workplace drug and alcohol testing. Employers will need to turn their minds to whether their policies require amendment and whether the change in law will change their employees’ on-duty conduct. The legalization of marijuana will affect the criminality of the drug, but does not change the fact that marijuana is an impairing substance that is unacceptable in the workplace in normal circumstances. As always, employers will have an obligation to maintain a safe workplace while balancing the privacy interests of their employees.

**[1]** 2016 SCC 29.

 

**[2]** 2016 ONCA 256.

**[3]** 2016 ONCA 79.

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