

RECENT DEVELOPMENTS IN LABOUR AND EMPLOYMENT LAW

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AGENDA

1. 2020 Legislation Update (Federal and Manitoba)
2. Recent Federal Unjust Dismissal Case Law
3. Termination Provisions in Employment Agreements
4. Recent Manitoba Human Rights Decisions
5. Social Media in the Workplace



LEGISLATION UPDATE

WHICH JURISDICTION GOVERNS FIRST NATION EMPLOYEES

- determining which jurisdiction applies federal or provincial will impact – labour standards, occupational safety, etc.
- the default position is labour/employment law is governed by the provinces/territories
- First Nations and First Nations governance is federal
- so which jurisdiction applies?

FEDERAL LEGISLATIVE CHANGES THAT AFFECT FEDERALLY REGULATED EMPLOYERS



FEDERAL LEGISLATIVE CHANGES THAT AFFECT FEDERALLY REGULATED EMPLOYERS

1. Bill C-86 - Various amendments to the *Canada Labour Code* and related legislation – Some amendments in force
2. *Pay Equity Act* – Not yet in force
3. Bill C-65 – Amendments to the *Canada Labour Code* for harassment prevention – Not yet in force

BILL C-86 – VARIOUS AMENDMENTS TO THE *CANADA LABOUR CODE*

Amendments Currently in Force

LEAVES OF ABSENCE

- Medical leave:
 - employees will not need to have a minimum of three months employment to qualify for medical leave (i.e. sick leave)
 - upon written request, employer must advise employee of promotion or training opportunities arising during absence
- Personal leave increased from 3 to 5 days – first three days paid for employees with more than three months' service
- New unpaid jury duty leave
- Maternity/Parental leave – will no longer need to have 6 months' minimum employment to qualify for these leaves

HOLIDAY PAY AND BEREAVEMENT LEAVE

- Entitlement to holiday pay will be automatic – 30 day waiting period is repealed
- Bereavement Leave – Increased from 3 to 5 days, and can be taken up to 6 weeks after the death or memorial

BREAKS, REST PERIOD AND SCHEDULE

- New break of thirty minutes every five consecutive hours of work – if required to stay at work, must be paid
- Employer must provide rest period of eight consecutive hours between shifts
- Must provide at least 96 hours' notice to employees for schedule of hours of work (unless collective agreement provides otherwise)
 - if providing less than 96 hours' notice, employee can refuse work
- Note: All of the above are subject an emergency exception where there is serious threat to health or safety of person or property or the operations of a business

BREAKS AND VACATION

- New unpaid break for employees to accommodate any medical concerns of the employee or to allow the employee to nurse or express breast milk
 - employee must provide a certificate from a health care practitioner to justify the need for, length and frequency of breaks for medical reasons
- Increased vacation entitlements as follows:

Consecutive Years of Employment	Vacation Entitlement	Vacation Pay
1 year	2 weeks	4% of annual wages
5 years	3 weeks	6% of annual wages
10 years	4 weeks	8% of annual wages

BILL C-86 – VARIOUS AMENDMENTS TO THE *CANADA LABOUR CODE*

Amendments coming into force

INDIVIDUAL TERMINATION

- Recall *Wilson v. Atomic Energy* decision – cannot dismiss except for cause or genuine restructuring
- Increased notice periods for individual termination of employment as follows:

Minimum Consecutive Months of Employment	Notice Period
3 Months of Consecutive Employment	2 Weeks' Notice
3 Years of Consecutive Employment	3 Weeks' Notice
4 Years of Consecutive Employment	4 Weeks' Notice
5 Years of Consecutive Employment	5 Weeks' Notice
6 Years of Consecutive Employment	6 Weeks' Notice
7 Years of Consecutive Employment	7 Weeks' Notice
8 Years of Consecutive Employment	8 Weeks' Notice

GROUP TERMINATION

- If an employer is implementing a group termination (i.e. 50+), must satisfy one of the following:
 1. The employer can elect to provide 16 weeks' written notice to the Minister, and then the employees or union, as applicable; or
 2. If the employer provides the employees with at least 16 weeks' pay in lieu of notice, the employer can elect to provide 48 hours' written notice to the Minister and employees or union, as applicable.
- In addition, employer must provide to employees an additional eight weeks' pay, notice or some combination of pay and notice
- If providing pay in lieu of notice, must provide transitional support services

UNJUST DISMISSAL COMPLAINTS

- Powers of the Canada Industrial Relations Board have been expanded to include the handling of unjust dismissal complaints
- Inspector can deem a complaint withdrawn if complainant fails to refer the matter to the CIRB
- CIRB can suspend a complaint if the complainant must take measures before the CIRB can address the complaint

UNJUST DISMISSAL COMPLAINTS

- CIRB can reject the complaint in whole or in part if:
 - the complaint is not within its jurisdiction
 - the complaint is frivolous, vexatious or not made in good faith
 - the complaint has been settled in writing between the employer and the complainant
 - there are other means available to the complainant to resolve the subject matter of the complaint that the Board considers should be pursued
 - the subject matter of the complaint has been adequately dealt with through recourse obtained before a court, tribunal, arbitrator or adjudicator

EXPENSE REIMBURSEMENT

- An employee is entitled to reimbursement of reasonable work-related expenses, subject to the provisions of any applicable collective agreement and the regulations
- Legislative confirmation of what has been recognized by common law for years

LEGISLATED EMPLOYMENT AGREEMENTS?

- A Federal employer must provide a new employee, within the first thirty days of their employment, a written statement detailing the following benefits:
 - Vacation Benefits
 - Wages
 - Severance Pay
 - Any other Benefits provided

EQUAL PAY

- Employers will be prohibited from paying employees differently based on differences in employment status if the employees perform the same or similar work
 - exceptions will permit differential pay based on seniority, merit, work quantity or quality and other prescribed considerations
- Employees will be entitled to ask for a wage rate compliance review, and employer must respond within 90 days by increasing the wage or explaining how it is in compliance
- Will also apply to temporary work agencies
- Employers who inform employees in writing of opportunities for new positions or advancement will be required to advise all employees of the opportunity, regardless of employment status

PAY EQUITY ACT

- Employers with more than ten employees will need to establish pay equity plans within three years of legislation coming into force, and review the plan every five years
- Pay equity committees must be formed in unionized workplaces with more than ten employees and non-unionized workplaces with more than 100 employees
- Either the committee or employer must determine job classes with similar characteristics, determine which job classes are predominately male or female, determine the value of work and compensation in those classes and compare the classes
- If pay differences are found that adversely affect predominately female job classes, employer must increase compensation to eliminate the differences over a phased-in period of time

BILL C-65 – AMENDMENTS TO THE CANADA LABOUR CODE FOR HARASSMENT PREVENTION

- Received royal assent on October 25, 2018 expected to come into force in 2020
- Expands occupational health and safety protections to include “harassment and violence”:
 - “any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee.”
- Employers are required to take steps to prevent harassment and to investigate incidents
- Establish and provide comprehensive policy to employees
- Employees can report harassment to Minister to investigate

MANITOBA LEGISLATIVE CHANGES



BILL 7 – AMENDMENTS TO THE EMPLOYMENT STANDARDS CODE

- Replaced Domestic Violence Leave with “Interpersonal Violence Leave”
- Expanded the scope of this leave to cover:
 1. Domestic Violence
 2. Stalking
 3. Sexual Assault or Violence
 4. Interpersonal Violence of an employee’s dependent
- 17 weeks’ of unpaid leave, 5 of which are paid days

MANITOBA MINIMUM WAGE

- *The Employment Standards Code* provides that minimum wage will rise to reflect a change in the CPI
- The Minister must announce before April 1 of each year what the minimum wage will be effective October 1 of that year
- Minimum wage has increased \$0.30 – from \$11.35 to \$11.65 – effective Oct 1, 2019
- No increase in 2020 minimum wage has been announced yet – EXPECT AN INCREASE

RECENT UNJUST DISMISSAL DECISIONS

White and Mohawk Council of Kahnawake 2019 CarswellNat 2019 1492

Facts

- Application of law on random drug testing in a non-unionized atmosphere
- Complainant was a police officer for the Kahnawake Territory (Quebec). In 2016, suspended for possession of marijuana – signed a last chance agreement
- Several months later, the Council subjected all of its officers to a random test
- The Complainant failed his test and was terminated, filed a complaint for unjust dismissal
- Council defended termination of the results of this random test

White and Mohawk Council of Kahnawake 2019 CarswellNat 2019 1492

Findings

- Complaint falls on whether or not Council was entitled to randomly test its officers
- There is still a requirement to balance privacy rights vs. safety concerns in non-unionized workplaces
- Council had no policy for drug testing and there was no evidence that officers tested were unable to safely perform their duties.
- Complainant was reinstated and received back pay

Wasty and Cardinal Couriers Ltd., Re, 2020 CarswellNat 185

Facts

- Complainant was a Warehouse Sorter, hired in 2013
- In April 2019, engaged in verbal altercation with co-worker, calling him a “F***ing Idiot”
- The next day, wrote an email to his manager, attempting to justify his tirade, calling the co-worker “the worst and least intelligent person in the warehouse”
- Terminated for cause, employer still paid him 6 weeks’ notice
- Complainant alleges unjust dismissal, that termination was solely out of favoritism

Wasty and Cardinal Couriers Ltd., Re, 2020 CarswellNat 185

Findings

- Co-worker felt “demeaned, insulted and worthless” following interaction with the Complainant
- Adjudicator found that the employee took no responsibility for his actions, and showed no remorse, at the hearing or otherwise
- Found his outburst to be serious misconduct, and in light of his prior discipline, the termination was upheld

Monk and Vianet Inc., Re, 2020 CarswellNat 40

Facts

- Telecommunications company, Complainant hired in 2011 as a Technical Representative, in 2016 promoted to Network Operator
- From 2012 – November 2017, the Complainant receives numerous written warnings for absenteeism, tardiness and work performance
- In November 2017, the Complainant was absent without warning, the employer prepares a final warning – instead terminate and offer severance pay

Monk and Vianet Inc., Re, 2020 CarswellNat 40

Findings

- Adjudicator rejects employer's assertion that it can terminate on a without basis
- Found that Employer did practice progressive discipline, but was not consistent in doing so, and that none of the warnings issued could be considered a final warning
- Last incident of absenteeism was not found to be a culminating incident, as no warning that next incident would be grounds for termination
- Complainant's absence was not serious enough to warrant termination on its own – Employer did not treat absences as serious

Monk and Vianet Inc., Re, 2020 CarswellNat 40

Remedy

- Compensated for “whole loss”
- Received \$14,256.00 for lost wages
- Did not seek reinstatement – obtained new employment 5 months later

Jurisdictional Cases – Tacan and SVDN, 2020

CarswellNat 301

Jurisdictional Challenge – On the basis of Constitutional Division of Powers

- Complainant was employed as an activity worker for the First Nation's Community Care Program
- Worked closely with the Elders of the First Nation in administering care
- Terminated after nearly three years' service
- Employer made a preliminary argument that complaint should be dismissed on the basis that Tacan's employment was governed by provincial legislation

Jurisdictional Cases – Tacan and SVDN, 2020

CarswellNat 301

Findings

- Confirms that the NIL/TU,O test is the correct approach - the “what” over the “how”
- An employer can be both federally and provincially regulated for employment purposes
- Adjudicator finds that the “nature of her work was to provide activities, assistance and support for Elders”
- The Complainant’s employment was determined to be Federally regulated – hearing proceeds on the merits

Jurisdictional Cases – *Potekhin and Williams Lake Indian Band, Re*, 2019 CarswellNat 7644

Jurisdictional Challenge – On the basis of managerial exemption

- Complainant was an Operations and Maintenance Manager, terminated in December 2018
- Williams Lake brings preliminary objection to jurisdiction on the basis that the Complainant is a manager

Jurisdictional Cases – *Potekhin and Williams Lake Indian Band, Re*, 2019 CarswellNat 7644

Evidence of Managerial Duties

- Responsible for department's budget
- Attended strategic meetings with Chief and Council
- Heavily involved in hiring process, decision making authority on hours of work, vacation requests, issuing discipline
- Signing authority for department purchases

Jurisdictional Cases – *Potekhin and Williams Lake Indian Band, Re*, 2019 CarswellNat 7644

Findings

- Adjudicator found that the Complainant exercised significant authority
- The fact that he required approval from Chief and Council for some decisions did not persuade the adjudicator
- Determined to be a manager under the Code, complaint was dismissed for lack of jurisdiction

TERMINATION PROVISIONS IN EMPLOYMENT AGREEMENTS

Amberber v. IBM Canada Ltd., 2018 ONCA 571

- Employee was terminated without cause by the employer
- Employee's contract had termination clause that provided:
 - If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary (the "*Options Provision*"). This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation (the "*Inclusive Payment Provision*"). In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment (the "*Failsafe Provision*")

Amberber v. IBM Canada Ltd., 2018 ONCA 571

- Employee filed lawsuit challenging the validity of the provision
- Motions judge concluded that termination clause was ambiguous and found that the employee was therefore entitled to common law reasonable notice – the employer appealed
- The ONCA disagreed with the motions judge, finding that the judge divided the termination clause into its constituent parts and strained to create an ambiguity where none existed, when she should have interpreted the clause as a whole
- The ONCA allowed the appeal - concluding that the termination clause was not ambiguous, and that the employer complied with both the clause and its statutory obligations

Andros v. Colliers Macaulay Nicolls Inc., 2019 ONCA 679

- Andros worked for Colliers as a Senior Associate and then a Managing Director
- Terminated with nearly 8 years service, received the minimum payments under employment standards legislation
- **Termination Clause**

4. Term of Employment ... The company may terminate the employment of the Managing Director by providing the Managing Director the greater of the Managing Director's entitlement pursuant to the Ontario Employment Standards Act or, at the Company's sole discretion, either of the following: a. Two (2) months working notice, in which case the Managing Director will continue to perform all of his duties and his compensation and benefits will remain unchanged during the working notice period. b. Payment in lieu of notice in the amount equivalent of two (2) months Base Salary

Andros v. Colliers Macaulay Nicolls Inc., 2019 ONCA 679

- Motions Judge determined it was an unenforceable clause, ordered common law notice damages
- On appeal, the ONCA confirmed the Motion Judge's decision, finding that the clause was split into 2 sections, and that the second section attempted to contract out of employment standards legislation
- The Court found minor differences in language to distinguish from arguments made on the basis of the *Amberber* decision
- Appeal was dismissed, termination clause was held invalid

Rossman v. Canadian Solar Inc., 2019 ONCA 992

- Rossman commenced employment with Canadian Solar in 2010 as a Project Manager, terminated in 2014 without cause
- Termination Clause – reviewed by a lawyer prior to signing:

*9.01 The parties understand and agree that employment pursuant to this agreement may be terminated in the following manner in the specified circumstances: ... (c) by the Employer, after the probation period, in its absolute discretion and for any reason on giving the Employee written notice for a period which is the greater of: (i) 2 weeks, or (ii) In accordance with the provisions of the Employment Standards Act (Ontario) or other applicable legislation, or on paying to the Employee the equivalent termination pay in lieu of such period of notice. The payments contemplated in this paragraph include all entitlement to either notice of pay in lieu of notice and severance pay under the Employment Standards Act Ontario. In the event the minimum statutory requirements as at the date of termination provide for any greater right or benefit than that provided in this agreement, such statutory requirements will replace the notice or payments in lieu of notice contemplated under this agreement. **Benefits shall cease 4 weeks from the written notice***

Rossman v. Canadian Solar Inc., 2019 ONCA 992

- Motion Judge determined that the termination clause was unenforceable “Benefits shall cease 4 weeks from the written notice” – awarded 5 months’ notice
- On appeal, the ONCA confirms that the termination was void at worst or unambiguous at best
- The 4 weeks clause provided the potential that Rossman would receive less than what is prescribed under employment standards legislation
- The fact that it was at times compliant with employment standards legislation is irrelevant
- ONCA also signals its displeasure for failsafe clauses

TIPS FOR DRAFTING TERMINATION PROVISIONS

- The termination clause should specify the amount of notice or pay in lieu of notice to which an employee is entitled if they are terminated without cause
- Avoid failsafe clauses if possible
- The clause *cannot* indicate that an employee is entitled to any amount of notice or pay in lieu of notice that is less than an employee's statutory minimum entitlement to notice or pay in lieu of notice
- The termination clause should indicate that the amount of notice or pay in lieu of notice that an employee is entitled to constitutes the *entirety* of the notice or pay in lieu of notice to which an employee is entitled
- If a contract is silent on this point, then the employee will be entitled to common law reasonable notice

Recent Manitoba Human Rights Decisions

T.M. and Government of Manitoba (MB Justice), 2019 MBHR 13 (CanLII)

- Complainant was a Juvenile Counsellor at the Manitoba Youth Centre
- From 2002 onward, was subject to harassment from his co-workers on the basis of sexual orientation
- Spoke to his supervisor about some of the incidents, no action taken
- 2009 had a panic attack from the harassment
- December 2012, invited to a staff event, where he was sexually assaulted
- February 2013, T.M. files a formal harassment complaint

T.M. and Government of Manitoba (MB Justice), 2019 MBHR 13 (CanLII)

- After filing his complaint, the Human Resources department indicated they could not do anything unless he named the harassers
- He refused out of fear of retribution, shortly after, the complaint was closed
- Eventually he elevated his complaints to his MLA and the Civil Service Commissioner
- October 2014, an investigation is finally commenced
- February 2015, none of the allegations made are substantiated, despite that many interviewed acknowledged he was teased for “being gay”
- Resigned in 2017

T.M. and Government of Manitoba (MB Justice), 2019 MBHR 13 (CanLII)

Findings

- Adjudicator found that T.M. was subject to harassment which was “offensive, demeaning, objectionable, abusive and unwelcome”
- Employer’s duty to address harassment is triggered when aware of allegations, not actual harassment – which was February 2013 at the latest
- Employer miserably failed in its duty to investigate allegations of harassment
- Despite T.M. not disclosing names initially, he provided enough information to conduct investigation
- When they did conduct a formal investigation, its conclusion was unreasonable

T.M. and Government of Manitoba (MB Justice), 2019 MBHR 13 (CanLII)

Remedy

- Complaint substantiated
- HR required to take harassment prevention and response training
- Awarded \$75,000 for injury to dignity, feelings and self-respect – Largest in Manitoba Commission's history

A.B. and University of Manitoba, 2020 MBHR 1

- Complaint was convicted in 2007 for sexual touching of a minor and child pornography
- University terminated his employment
- A.B. filed a complaint, alleging discrimination on the basis of his criminal record
- Criminal Record is not a protected ground under Manitoba Human Rights Legislation
- University files a preliminary motion to dismiss, on the basis that criminal record is not a protected ground
- Motion is dismissed, criminal record is considered an analogous ground

SOCIAL MEDIA IN THE WORKPLACE

SOCIAL MEDIA & OFF DUTY CONDUCT

An Employer's right to act on an employee's off-duty conduct is limited



OFF DUTY CONDUCT & SOCIAL MEDIA

When is the off duty conduct subject to discipline or termination – consider if the conduct:

- harms the employer's reputation or product
- prevents the employee from continuing to satisfactorily work
- gives other employees concern or pause to work with the employee
- gives rise to the serious breach of the law; or
- creates difficulty for the employer in managing the business

OFF DUTY CONDUCT & SOCIAL MEDIA

York University Staff Association v York University, 2018 CanLII 41354 (ON LA)



OFF DUTY CONDUCT SOCIAL MEDIA

York University Staff Association v York University, 2018 CanLII 41354 (ON LA)

Facts

- Unionized Lab Tech with 23 years of service is terminated for Facebook Postings
- Set up lab equipment, involved interaction with university staff and students
- Public Facebook account, referencing his employment at the university
- Made frequent posts, which were disparaging to Jewish People, including claims of Jews instigating the holocaust

OFF DUTY CONDUCT SOCIAL MEDIA

York University Staff Association v York University, 2018 CanLII 41354 (ON LA)

Facts

- During the hearing, he alleged the posts were not anti-semitic, that he had a lot of Jewish friends and that he would not stop posting

Decision

- Arbitrator found that connection between his employment listed on his profile and the nature of posts caused reputational harm to the University
- Termination was upheld

OFF DUTY CONDUCT SOCIAL MEDIA

The takeaways:

- Facebook postings and other online content authored by employees connected to work can result in discipline or discharge – determining the penalty will depend on the facts including:
 - nature and frequency of the comments
 - how insolent, insulting or insubordinate the comments are
 - the damage to individuals and employer
 - have the comments poisoned the workplace so that there is cause to terminate the employee

SOCIAL MEDIA & SICK LEAVE ABUSE

- Can be very difficult to confirm a suspicion of an employee who is abusing sick leave
- Social media can be a very useful tool for information gathering and as evidence in legal proceedings



SOCIAL MEDIA AND SICK LEAVE ABUSE

Re Toronto (City) and TCEU, Local 416 (Walker), 2017 CarswellOnt 18303

Facts

- Grievor was a solid waste collection operator for the city (insert service years)
- On her way to work, in a car accident, attends a walk-in clinic and provides her employer with a medical note stating she needs a leave for rest
- The next day, she posts photos of herself vacationing in Jamaica
- Upon her return, she is terminated

SOCIAL MEDIA AND SICK LEAVE ABUSE

Re Toronto (City) and TCEU, Local 416 (Walker), 2017 CarswellOnt 18303

Findings

- In order to justify termination, there must be a finding of sick leave fraud or an intention to deceive
- The photos posted on Instagram had a significant “self-incriminating impact”
- Timing of vacation was suspect as well, the arbitrator suspected it was premeditated

SOCIAL MEDIA AND SICK LEAVE ABUSE

Re *R.K v. High School*, 2019 Canada Labour Code Adjudication (unreported) – Manitoba Case

Facts

- Child supervisor at the school, had some personality conflicts with other employees
- Out of the blue, provides a medical note, taking her off work for a prolonged period
- Shortly after going on medical leave, takes a trip to Calgary, documents her road trip on Facebook

SOCIAL MEDIA AND SICK LEAVE ABUSE

Re *R.K v. High School*, 2019 Canada Labour Code Adjudication (unreported) – Manitoba Case

Findings

- Evidence of Facebook Postings was accepted as evidence supporting termination
- Misuse of medical leave, employee showed no remorse until the hearing
- Termination upheld

QUESTIONS & THANK YOU

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