A Review of the Labour and Employment Year in Atlantic Canada: Part 1



The first part of this two-part review of the labour and employment year in Atlantic Canada covers developments in Nova Scotia and Newfoundland. This piece is also from 2020 and, as such, reflects the laws and cases from that year.

Introduction

2019 saw a number of changes to the legal landscape across Canada. We experienced a year of legalisation of cannabis for recreational use, the continuing impact of the #MeToo movement, and a federal election; all of which has impacted workplaces from coast to coast. This article looks back at some of the developments in labour and employment law across in Nova Scotia and Newfoundland and upcoming changes for 2020.

Nova Scotia

Change to unionisation rules in the construction industry

In the construction industry, employer-friendly amendments to the Nova Scotia Trade Union Act General Regulations came into force which require applications for certification to be made Monday to Friday when a more representative number of employees is generally present on site. Prior to this, when more than 50% of employees in the construction industry working on the date of the application for certification demonstrated support, the workforce could become unionised without a vote. Therefore, when applications were made on weekends (typically when a smaller number of employees were on site), it would have a profound impact on workplaces where a small number of employees would trigger the unionisation of a larger group of employees.

Workplace harassment

Workplace harassment has been a hot topic throughout 2019 for Nova Scotia employers in all industries. In Harpell v Lawton's Drug Store (2019 NSLB 56 (CanLII)), the Nova Scotia Labour Board dismissed an appeal under the Occupational Health and Safety Act (the 'Act') concerning an alleged violation of s45 of the Act, which prohibits discriminatory action by an employer against an employee who has acted in compliance with or has sought enforcement of the Act. In this decision, the complainant filed a discriminatory action complaint against the employer alleging she had been terminated

as a result of her reports to management of harassment and bullying by a co-worker. An Occupational Health and Safety Officer began to investigate the complaint, which was challenged by the employer on the basis of jurisdiction and ultimately stopped. The complainant appealed that decision to the Nova Scotia Labour Board. The Board found that the type of harassment and bullying the complainant was alleging was not covered under the Act or the Violence in the Workplace Regulations, noting that to broaden the scope of protection was the role of the legislature, not the Board and that even if it had been, the complaint would have failed because the complaint did not relate to compliance or enforcement of the Act.

Unrelated to this decision, in October of 2019, an opposition bill was introduced that would amend the Act to expand the definition of violence to encompass workplace harassment and bullying, so this is something to keep an eye on for 2020.

Inappropriate conduct at work

In the category of workplace conduct that we wish we didn't need to talk about, a Nova Scotia arbitrator recently upheld the just cause termination of a complainant for masturbating at work in Unifor, Local 2215 v IMP Group Limited (Aerospace Division) (2019 CanLII 42096). The employer received complaints about an employee masturbating in one of the stalls in a workplace bathroom. The employer confronted the employee and warned him of the inappropriateness of the behaviour. While the employee ceased the practice for a time, he continued masturbating at work, attracting more workplace complaints. After an investigation, the employer terminated the employee's employment. At arbitration, the union argued that the his behaviour was as a result of a sex addiction and termination was not appropriate. Arbitrator Gus Richardson. QC dismissed the grievance and upheld the termination, finding that the employee knew or ought to have known that his behaviour violated the employer's policies, that the allegation of a sex addiction to explain the behaviour was not well founded and termination for cause was justified in the circumstances.

Leave for victims of domestic violence

In Nova Scotia, 2019 brought with it the introduction of leave for victims of domestic violence. Employees are entitled to unpaid leave of up to ten intermittent or consecutive days per year and up to 16 consecutive weeks. Up to three days per calendar year must be paid. The leave applies to situations in which an employee is abused by their current or former intimate partner, their child, a person under 18 years of age who lives with them or an adult who lives with them who is related to them by blood, marriage, adoption or foster care, or an employee's child who is abused by the child's current or former intimate partner, or a person who lives with the child.

Newfoundland

Family violence leave

In Newfoundland & Labrador, the past year marked the introduction of family violence leave. As of 1 January 2019, the Labour Standards Act was amended to include three days of paid family violence leave and seven days unpaid family violence leave per year where an employee or a person to whom the employee is a parent or caregiver has been directly or indirectly subjected to, have been a victim of, have been impacted or seriously affected by or have witnessed family violence. The leave is to allow the employee or a person to whom the employee is a parent or caregiver to seek and receive medical attention, counselling or other services.

PTSD presumption

On 1 July 2019, amendments to the Workplace Health, Safety and Compensation Act came into force which added a post-traumatic stress disorder ('PTSD') presumption, making it easier for those with PSTD to obtain benefits. Where a worker is exposed to a traumatic event or events in the course of employment and is diagnosed with PTSD, the PTSD is presumed to have arose out of and in the course of employment.

Workplace harassment

In line with Nova Scotia and New Brunswick, 1 January 2020 will mark the introduction of amendments to the Occupational Health and Safety Regulations that will address workplace harassment.

Discrimination based on marital status

The Newfoundland and Labrador Human Rights Commission considered discrimination in employment based on marital status in McBreairty v College of the North Atlantic (2019 CanLII 97520 (NL HRC)), released in October 2019. The complainant was employed by the college as an instructor. She applied for a position at the college's Qatar campus and was successful but her initial contract was not renewed. The complainant alleged that her contract was not renewed and she was screened out of other job competitions at the college due to an acrimonious relationship between her former husband and the college. The complainant's husband had been employed by the college but was dismissed for cause. The complainant and her husband had engaged in a lengthy back and forth with the college regarding a number of issues. The college argued that the complainant was not provided with a contract renewal or offered any subsequent positions was as a result of either the fact that she was not approved to stay in Qatar beyond the contract or because she lacked the required skill, ability or qualifications for the positions for which she had applied. The adjudicator found that the college did not discriminate against the complainant on the basis of marital status and that any animosity that existed was as a result of her own actions and dismissed the complaint.

Medical cannabis use

In Newfoundland & Labrador, accommodation for medical cannabis remained a live issue in 2019. In a positive decision for employers, the Newfoundland & Labrador Supreme Court dismissed an application for judicial review of an arbitration decision which found that the employer had met its duty to accommodate an individual who was denied employment due to his use of medically prescribed cannabis in International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc. (2019 NLSC 48 (CanLII)). This is a decision that all employers struggling to deal with cannabis in the workplace should read.

The individual was a labourer who suffered from chronic pain due to Crohn's disease and osteoarthritis for which he was prescribed cannabis. The employer was involved in safety-sensitive work on the Muskrat Falls project site. The prescription authorised the labourer to purchase dried marijuana but did not specify dose or frequency of use. He had worked on the project site until he was laid off and reported his cannabis prescription to his supervisor. Prior to his lay-off, the labourer was never involved in any reported safety-related incident. He subsequently applied for two vacant safety-sensitive positions with another employer involved with the project. He was offered one of the positions subject to a drug and alcohol/medical exam. When he attended for his screening, he disclosed his cannabis prescription and use and was not awarded the positions. The employer refused to hire the labourer as a result of his cannabis use and there were no other non-safety-sensitive positions available.

The arbitrator found that the labourer's cannabis use created a risk of impairment on

the job site and the employer was not able to readily measure impairment from cannabis. Therefore, the arbitrator found that the inability to measure and manage the risk of harm constituted undue hardship for the employer and dismissed the grievance. The Newfoundland & Labrador Supreme Court reviewed the decision of the arbitrator and upheld the arbitrator's decision, confirming that it would constitute undue hardship for the employer to employ the labourer in a safety-sensitive position when the risk of impairment on the job could not be alleviated by a reliable measure of impairment.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

by Caroline Spindler (Mathews, Dinsdale & Clark LLP) , Kyle MacIsaac (Mathews, Dinsdale & Clark LLP) and Tara Erskine (Mathews, Dinsdale & Clark LLP)