HR Year in Review: The 10 Most Important HR Cases of 2018

written by vickyp | December 19, 2018

1. **Supreme Court Strikes Down Québec Pay Equity Law as Unconstitutional**

In a year where new pay equity legislation was such a predominant theme, existing pay equity law in Québec was the focus of the biggest and perhaps most shocking case of 2018. This blockbuster actually came down in a pair of companion cases challenging different aspects of the provincial law requiring equal pay for equal work regardless of gender. In the first case, the Court ruled that 2009 provisions delaying implementation of equal pay for equal work in female-dominated sectors over 5-year audit periods perpetuated discrimination and violated the Charter rights of women [*Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 (CanLII), May 10, 2018]. The second case ruled that the 6-year delay in pay equity for teachers in daycare, while also discriminatory, was justified because the provincial pay equity commission needed more time to figure out how to implement the law in that particular sector [*Centrale des syndicats du Québec v. Quebec (Attorney General),* 2018 SCC 18 (CanLII), May 10, 2018].

2. **Ontario Hight Court Upholds Contractual Termination Notice Limits**

Contract clauses purporting to limit employee's notice for wrongful termination to the minimum notice required by the jurisdiction's employment standards law has been among the most heavily litigated areas of HR law in recent years. While each case is different, courts insist that these clauses be crystal clear and seize upon even the slightest of ambiguities to avoid enforcing them. So, it's somewhat surprising that in 2018, employers won not one but a pair of notable victories in notice cases before the Ontario Court of Appeal. The first ruling came down in January when the Court found that contract language contract saying that "the notice period shall amount to one week per year of service with a minimum of 4 weeks or notice required by the applicable labour legislation" was clear enough to enforce even though it didn't specifically mention the employee's common law notice rights [*Nemeth v. Hatch Ltd*., 2018 ONCA 7 (CanLII), Jan. 8, 2018]. Six months later, the Court reversed a lower court ruling banning IBM from relying on such a clause to limit a 15.5-year employee

terminated without cause to 19.4 weeks' notice. The notice limit was totally clear, said the Court, and the lower court was wrong to chop it into tiny pieces in an attempt to find ambiguity where none existed [*Amberber v. IBM Canada Ltd*., 2018 ONCA 571, June 22, 2018].

3. **BC Arbitrator Says Random Drug Testing Violates Coal Miners' Privacy**

The battle over random drug testing of safety-sensitive workers continued. In 2017, employers went 1 and 1, with Toronto Transit Commission scoring a victory in Ontario and Suncor going down to defeat in Alberta. Three weeks into the new year, it was BC's turn to weigh in by striking down random testing for coal miners on privacy grounds. Employees should have lower privacy expectations if they do safety-sensitive jobs, the mining company argued. But the arbitrator disagreed noting that it's not just the bodily fluids but all the personal information employees who test positive must reveal that makes random testing so intrusive. And because it's "suspicion-less," the simple fact that the workplace is dangerous isn't enough to justify it. The employer must also show that there's an actual problem with drug/alcohol use at the particular workplace. The coal mine in this case didn't meet its burden. There was no specific evidence tying any particular accident or injury to an employee who was under the influence of drugs or alcohol; and only 3% of all post-incident tests done at its 5 coal mines over a 5-year period had come back positive [*Teck Coal Ltd. (Fording River and Elkview Operations) v United Steelworkers, Locals 7884 And 9346*, 2018 CanLII 2386 (BC LA), Jan. 23, 2018].

4. **Zero Tolerance Drug Policy Fails for Not Accommodating Legal Use of Medical Marijuana**

Although the October 17 legalization affected recreational marijuana, it did little to diminish the controversy over use of medical pot. One notable case began when an airport ramp agent failed a post-incident drug test after accidentally damaging an airplane. The agent denied being high at work and claimed the positive test was caused by traces of medical marijuana that he used legally away from work for a back injury. But the employer was unpersuaded and fired him when he refused to sign a last-chance agreement and enter the company EAP. No dice, said the federal arbitrator and ordered the agent reinstated. Although the agent occupied a safety-sensitive position, the testing policy was overbroad and discriminatory. The moment it learned that the positive test was the result of legally authorized medication, it was incumbent upon the employer to accommodate the agent. But while it made accommodations for addiction, the policy didn't accommodate lawful use of medical marijuana for physical and mental ailments to the point of undue hardship as required by human rights laws [*Airport Terminal Services Canadian Company v Unifor, Local 2002*, 2018 CanLII 14518 (CA LA), March 15, 2018].

5. **Not Discrimination to Deny Safety-Sensitive Job to Med Marijuana User**

Drug testing litigation was pretty evenly split during the year. One notable victory came from Newfoundland. After testing positive for THC, a worker conditionally offered the safety-sensitive position at a hydroelectric project admitted to using medical marijuana for osteoarthritis. Rather than instantly cancel the job offer, the contractor kept its head and requested medical information from the prescribing doctor so it could evaluate his fitness for the safety-sensitive job. Unsatisfied by the doctor's response, the contractor asked for more information and refused to let the applicant work any safety-sensitive job until it got the information it needed. The stalemate continued until the union filed a grievance. The arbitrator sided with the contractor, finding that it had tried to accommodate the applicant but lacked the medical information it needed to make a full assessment. Letting an admitted medical marijuana user do a dangerous job without being able to assess his capabilities and

fitness would impose undue hardship on the contractor [*IBEW, Local 1620 v. Valard Construction LP*, (Arb. John Roil, Q.C.), April 20, 2018].

6. **Alberta Court Says Near Miss = Grounds for Post-Incident Drug Testing**

Two electrical workers had to undergo post-incident drug and alcohol testing after being involved in a near miss with a heavy vehicle. The union didn't challenge the legality of the actual testing policy; it challenged the company's right to apply it in this incident since it resulted in only minor property damage. But the arbitrator disagreed. A near miss in which nobody gets hurt may be enough to trigger post-incident testing if it has the potential to cause serious injury. Moreover, the company didn't call for testing willy-nilly but only after making the determination that the incident was the result of human error, that drugs/alcohol *might have* caused that error and that testing should be used to rule out that suspicion. While acknowledging that it was a close case, the court found the arbitrator's ruling reasonable and refused to overturn it [*Canadian Energy Workers' Association v ATCO Electric Ltd*, 2018 ABQB 258 (CanLII), April 4, 2018].

7. **Ontario Tribunal Says Requiring Permanent Work Status Is Nationality Discrimination**

While the influx of new immigrants provides crucial relief for Canada's labour shortage, it also creates legal challenges for employers, as exemplified by this July case involving a foreign engineering student. Although he had stellar credentials and a 3-year postgraduate work permit, an energy company wouldn't offer him permanent employment without assurance of his eligibility to work in Canada on a "permanent basis." The student claimed citizenship discrimination and the Human Rights Tribunal agreed. The permanence policy, although limited to "career" positions, was a form of direct discrimination and there was no evidence that it served any safety or other legitimate business purpose such as to qualify as a bona fide occupational requirement. So, the Tribunal gave the company 45 days to settle the claim or face a damages award [*Haseeb v. Imperial Oil Limited*, 2018 HRTO 957 (CanLII), July 20, 2018].

8. **Denying Employee Time Off to Care for Her Autistic Son = Family Discrimination**

Work-life balance and the employer's duty to accommodate the scheduling needs of working parents remains a crucial issue in HR law, as exemplified by this complex Northwest Territories case raising the following question: Did an employer commit family discrimination by denying a booking clerk time off to care for her autistic son? While conceding that she had legitimate caregiving needs, the employer argued that the clerk didn't make reasonable efforts to make alternative care arrangements and that taking time off was a matter of preference not necessity. But the arbitrator disagreed. Sure, she *could have* worked nights and weekends while her husband cared for the child, the arbitrator conceded. But this child had special care needs requiring both parents' full attention, including on nights and weekends. The employer simply failed to grasp and adequately accommodate this crucial fact and led to a finding of liability, one which the court upheld as reasonable [*Municipal Corporation of the City of Yellowknife v. A.B.,* 2018 NWTSC 50 (CanLII), Sept. 19, 2018].

9. **BC Holds Employer Accountable for Not Controlling Sexually Harassing Client**

A nursery worker filed a discrimination complaint against her employer for not protecting her against sex harassment from a client. The nursery denied knowing anything about the situation, noting that while the worker had complained to co-workers she never filed a formal complaint with HR. But the Human Rights Tribunal

refused to dismiss the case. The she-never-told-us argument was a total non-starter. The nursery didn't have a sex harassment policy or complaint procedure and didn't train its workers on responding to harassment. So, any confusion on the worker's part was the nursery's fault. Result: She had a valid claim for sex harassment and deserved the chance to prove it in court [*Beharrell v. EVL Nursery*, 2018 BCHRT 62 (CanLII), March 14, 2018].

10. **Alberta Court Says Common-Law Spouses Have Same Pension Splitting Rights as Married Spouses**

One of the most influential court decisions of the year was an April case involving Sec. 78(a) of the Alberta *Employment Pension Plans Act* which allows married spouses to split their pension benefits. The common-law wife of a beneficiary asked a court to declare Sec. 78(a) in violation of the Charter because it doesn't give the same right to common-law spouses. And that's just what the court did saying that language bestowing common-law spouses the same rights to divide pension benefits as married spouses should be read into the statute. Epilog: Six weeks later, the Alberta Superintendent of Pensions issued Update 18-03 recognizing the ruling and recognizing the pension splitting rights of common-law spouses [*Lubianesky v Gazdag*, 2018 ABQB 290 (CanLII), April 13, 2018].