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PRODUCT SPOTLIGHT

From maternity leave and citizenship ceremony leave, to critically ill child care leave and reservist leave, there are many different leaves of absence from employment that may or may not be available under the employment standards legislation in each jurisdiction, and each leave has its own set of rules. The *Canadian Labour Law Reporter* provides helpful and detailed information about the leaves of absence that are available from coast to coast.

MARIJUANA POSSESSION AND USE AT WORK JUSTIFIED DISMISSAL, DESPITE EMPLOYEE'S "DRUG PROBLEM"

— Adrian Miedema. © Dentons Canada LLP. Reproduced with permission. Adrian Miedema is a Partner with Dentons Canada LLP in Toronto, and the Co-Editor of www.occupationalhealthandsafetylaw.com.

A mining company employee was properly dismissed for possessing and using marijuana at work, a labour arbitrator has held. And the employee had not proven that he had a drug problem that required the employer to accommodate.

The employee worked as a Plating Tankman at Vale's refinery in Thompson, Manitoba. The company had alcohol and drug policies aimed at safety in the workplace. The policies prohibited use and possession of illicit drugs at work. The arbitrator decided that the evidence was clear that despite the company's efforts, there was a drug problem in the workplace.

The employee admitted that he had worked under the influence. He argued, though, that under human rights legislation, the employer was required to accommodate his "drug problem". According to the arbitrator, the employee "described a pattern of marijuana use and abuse that was certainly consistent with an addiction illness." The employee claimed that he had been a heavy marijuana user since about age fifteen. He also claimed that the Addictions Foundation of Manitoba, where he had taken treatment, confirmed that he had an addiction diagnosis.

However, the arbitrator decided that the employee's failure to produce, at arbitration, a formal written diagnosis of addiction from the Addictions Foundation of Manitoba led to an "adverse inference" that the report would not

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support the employee's claim that he was addicted. Further, the employee's testimony about his pattern of marijuana use was questionable due to the problems with the employee's credibility; he had been dishonest with the company when he was initially confronted about his marijuana use at work.

As a result, the arbitrator decided that the employee "had a problem with marijuana use but a dependency or addiction was not established on the evidence." As such, he was not entitled to accommodation under human rights legislation.

The arbitrator decided that the drug use in this case was "especially egregious in that there was ongoing and frequent use with a hidden drug cache on the premises." The company had just cause to dismiss the employee.

Vale (Manitoba Operations) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 6166 (Arne Peltz, Labour Arbitrator, August 2, 2013).

This article originally appeared on www.occupationalhealthandsafetylaw.com.

ACCOMMODATING BREASTFEEDING REQUESTS

— By Paul Boshyk. © McMillan LLP.

As human rights tribunals expand the concept of family status and an employer's duty to accommodate child care and other family care arrangements, what obligations does an employer have to accommodate an employee who wants to continue breastfeeding her child following her return from pregnancy or parental leave? Is there any obligation to accommodate an employee after the child has turned a year old?

There are no reported Ontario decisions where this issue is squarely addressed. However, there are three reported cases from other jurisdictions that review the question and they all come to the same conclusion: there is a duty to accommodate a mother who is breastfeeding and failure to do so will constitute discrimination on the ground of sex.

In *Poirier v. British Columbia (Ministry of Municipal Affairs, Recreation and Housing)*,[1] the employee alleged that the respondent discriminated against her when it refused to allow her to continue to breastfeed her child at work or at seminars presented by the employer. The B.C. Human Rights Tribunal found that as the capacity to breastfeed is unique to the female gender, discrimination on the basis that a woman is breastfeeding is a form of sex discrimination.

In *Cole v. Bell Canada*,[2] the complainant returned to work after 12 months of pregnancy and parental leave and asked her employer to provide her with a work schedule that would enable her to go home and breastfeed her child at the same time every day. She was granted her request, on different grounds, for one year. However, after one year, the employer refused to continue to accommodate her. The Tribunal found that accommodating the complainant with a guaranteed shift end so that she could breastfeed her child would not have imposed any hardship on the respondent.

In *Carewest v. H.S.A.A.*,[3] the grievor wanted to extend her maternity leave from six months to nine months, and later to a year in order to continue breastfeeding her child at home. The employer denied the request. The arbitrator found that "the employer was simply not prepared to entertain any alternative other than the one it had proposed of allowing the grievor to express or pump her milk during her scheduled breaks."[4] As a result, the employer had failed in its duty to accommodate.

These cases illustrate that employers cannot fall back into "traditional" thinking that breastfeeding only occurs during the first 12 months. As the *Carewest* case makes clear, an employer cannot require a nursing mother to "pump" or rely on stored breast milk, so the employer must respond to the request with a sincere effort to reach a reasonable accommodation. An employer responding to such a request will need to review its operations to determine whether an employee's hours of work can be changed, whether break times can be lengthened or moved to allow employees to travel home, or whether the work location should be changed (for employers with multiple sites) or a work from home arrangement put in place.

Notes:

[1] [1997] B.C.H.R.T.D. No. 14.

[2] 2007 CHRT 7 ("*Cole*").

[3] (2001), 93 L.A.C. (4th) 129.

[4] *Ibid.*, para 86.

PROGRESS OF LEGISLATION

Manitoba Proposes Amendments Aimed at Protecting Temporary Employees and Foreign Workers

On April 15, 2014, Bill 50, *The Protection for Temporary Help Workers Act (Worker Recruitment and Protection Act and Employment Standards Code Amended)*, received first reading. Some of the most important proposed amendments are discussed below.

Bill 50 would, if passed, amend *The Worker Recruitment and Protection Act* by including definitions of "temporary help employee", "temporary help agency", and "client" (in relation to temporary help agencies) and requiring that all temporary help agencies be licensed. In addition, Bill 50 would prohibit temporary help agencies from:

- charging fees to individuals for becoming temporary help employees;
- charging fees to temporary help employees connected with assignment (or attempted assignment) to perform work with a client (or a potential client);
- charging fees to temporary help employees for entering into an employment relationship with a client;
- restricting temporary help employees from becoming employees of a client;
- restricting a client from employing a temporary help employee;
- restricting a client from providing a reference to a temporary help employee;
- charging a client a fee where a temporary help employee becomes an employee of the client (subject to regulation); and
- charging fees to, or imposing restrictions on, temporary help employees or clients, where such fees or restrictions are precluded by regulation.

If passed, Bill 50 would specify that any provision in an agreement made between a temporary help agency and a client or a temporary help employee that is inconsistent with the new temporary help agency provisions in *The Worker Recruitment and Protection Act* is void. The new temporary help agency provisions would apply to all agreements between agencies and their employees and clients, regardless of whether entered into prior to October 1, 2014.

Another proposed amendment to *The Worker Recruitment and Protection Act* would permit the Director of Employment Standards to authorize, in writing, an employer to use an unlicensed foreign worker recruiter in instances where the employer is qualified to be registered to recruit a foreign worker, the employer has applied for registration, and "the wages to be paid by the employer in respect of the position to be filled by a foreign worker will be at least two times the Manitoba industrial average wage, as prescribed by regulation under *The Employment Standards Code*."

Record-keeping requirements would be modified for licensees, as well as for unlicensed individuals who are authorized to recruit foreign workers.

Bill 50 would also amend *The Employment Standards Code* by adding comparable definitions for "temporary help agency", "temporary help employee", and "client" (in relation to temporary help agencies), by specifying that a temporary help agency is the employer of its temporary help employees, and by clarifying that the employment relationship continues where a temporary help employee is assigned "by the agency to perform temporary work for a client." Also, the Bill would include an amendment providing that, subject to regulation, temporary help employees are not covered by the exception from the notice of termination requirements set out in section 62(1)*(e)* of *The Employment Standards Code*.

If passed, Bill 50 would come into force on October 1, 2014.

Manitoba Introduces Amendments Which Would Require the Labour Board To Implement Time Lines for Hearings and Decisions

On April 17, 2014, Bill 54, *The Labour Relations Amendment Act (Time Lines for Labour Board Decisions and Hearings)* was introduced. If passed, Bill 54 would amend *The Labour Relations Act* to require the Labour Board (the "Board") to make regulations establishing time lines within which decisions on complaints, applications, or referrals must be

rendered following the conclusion of a hearing. In addition, the Board would be required to make regulations respecting the time within which hearings on applications for certification and decertification must be held. These regulations could provide the chairperson of the Board, in exceptional circumstances, with the discretion to extend a time limit with respect to a specific case or to extend the time limit applicable to the provision of written reasons.

If passed, Bill 54 would require the Board to make the required regulations within one year. The Board would have to review these regulations within two years of Bill 54 coming into force, and at least every six years thereafter. Bill 54 would come into force on Royal Assent.

Nova Scotia Introduces Amendments Which Would Update the *Apprenticeship and Trades Qualifications Act*

Bill 45, the *Apprenticeship and Trades Qualifications System Reform (2014) Act*, would, if passed, significantly update Nova Scotia's *Apprenticeship and Trades Qualifications Act* (the "Act"). Bill 45 would provide for the creation of the Nova Scotia Apprenticeship Agency (the "Agency"), the establishment of an operating charter for the Agency, and the appointment of a chief executive officer of the Agency. Among its other amendments, Bill 45 would include or update a number of definitions, vary the powers of the minister responsible for the Act, alter the manner by which members of the Apprenticeship Board (the "Board") are appointed, modify the duties and responsibilities of the Board and the Director of Apprenticeship and Trades Qualifications, substitute an appeal panel for the appeal board, and alter the scope of the areas over which the Governor in Council may make regulations.

Bill 45 received first reading on April 10, 2014 and second reading on April 22.

Prince Edward Island's Minimum Wage Will Increase on June 1 and Again on October 1

Prince Edward Island has announced that its minimum wage will increase from the current rate of $10 per hour to $10.20 per hour, effective June 1, 2014. On October 1, 2014, the minimum wage rate will increase again, to $10.35 per hour.

Saskatchewan Files First Regulations Under New Employment and Labour Legislation

Saskatchewan has filed the first two regulations under *The Saskatchewan Employment Act*, SS 2013, c. S-15.1, the comprehensive new employment and labour legislation that received Royal Assent on May 15, 2013, but has not yet been proclaimed in force. Some of the most important provisions of the new regulations are discussed below.

The Saskatchewan Employment (Labour Relations Board) Regulations, RRS, c. S-15.1, Reg 1 (the "LRB Regulations"), were filed on March 25, 2014, and will "come into force on the day on which section 1-1 of *The Saskatchewan Employment Act* comes into force".

The LRB Regulations contain a number of forms that will be used by the Labour Relations Board and set out rules with regard to their filing. In addition, the LRB Regulations contain information about a variety of topics, such as:

- replies;
- intervention;
- conduct of votes under *The Saskatchewan Employment Act* or the LRB Regulations;
- hearings;
- adjournments;
- service of forms and documents;
- applications for summary dismissal; and
- applications for reconsideration.

The Minimum Wage Regulations, 2014, RRS, c. S-15.1, Reg 3, were filed on March 28, 2014. *The Minimum Wage Regulations, 2014* will come into force on the day that section 2-1 of *The Saskatchewan Employment Act* comes into force.

The Minimum Wage Regulations, 2014 set out a formula according to which the provincial minimum wage may be adjusted each year. This formula incorporates the percentage change for the preceding year of both the "average hourly wage for employees 15 years of age and over for Saskatchewan as published monthly by Statistics Canada" and the "Consumer Price Index for Saskatchewan as published monthly by Statistics Canada".

The minimum wage rate may be fixed yearly, on or before June 30, by the Lieutenant Governor in Council, and covers the pay period from October 1 of that year until September 30 of the subsequent year. According to section 3(7), where the Lieutenant Governor in Council does not fix a new rate by June 30, the rate for the upcoming pay period will be the same as in the previous one, and the minister responsible for administering *The Saskatchewan Employment Act* shall notify the public accordingly. As soon as reasonably possible after June 30 each year, the minister must ensure that the minimum wage rate for the upcoming pay period is published in *The Saskatchewan Gazette* and otherwise brought to the attention of the public.

In addition, *The Minimum Wage Regulations*, RRS c. L-1, which are currently in force, will be renamed as *The Conditions of Employment Regulations*, and sections 2 and 4 (which deal with minimum wage rates and statements of earnings) will be repealed.

Employees (other than certain enumerated employees) who are required to report to work (other than for overtime), "shall be paid a minimum sum equal to three times the employee's hourly wage, whether or not the employee is required to be on duty for three hours on that occasion." A copy of *The Minimum Wage Regulations, 2014* and *The Conditions of Employment Regulations* (or an abstract thereof) will have to be posted conspicuously in the place where employees are working, and a copy (or an abstract) must be provided at the time of hiring to each employee who requests one.

Yukon Has Amended the Provisions Related To Its Recently Enacted Leaves of Absence

The *Act to Amend the Employment Standards Act* (formerly Bill 68), has received Royal Assent and is now in force. The Act altered certain aspects of two unpaid leaves in the *Employment Standards Act*: critically ill child care leave and crime-related child death or disappearance leave.

With respect to crime-related child death or disappearance leave, the maximum amount of leave that an employee can take has been increased from 35 weeks to 52 weeks in the case of a disappearance and 104 weeks in the case of a death.

In addition, the qualifying periods for both critically ill child care leave and crime-related child death or disappearance leave have been decreased from 12 months to six months.

Bill 68 received first reading on April 1, 2014, second reading on April 10, third reading on April 14, and Royal Assent on April 17.

ONTARIO HUMAN RIGHTS COMMISSION RELEASES NEW POLICY ON DISCRIMINATION RELATED TO GENDER IDENTITY AND GENDER EXPRESSION

— Edward Noble. © Wolters Kluwer Limited.

On April 14, 2014, the Ontario Human Rights Commission (the "Commission") announced the release of its new "Policy on preventing discrimination because of gender identity and gender expression" (the "Policy"). The Policy is intended to protect the human rights of Ontario's trans people. The Policy represents an update of the Commission's earlier "Policy on discrimination and harassment because of gender identity", which was originally released in 2000. That document has been extensively revised to reflect amendments to Ontario's *Human Rights Code* (the "Code"), as well as considerable consultation and research.

The Policy contains definitions of "gender identity" and "gender expression", both of which were added as prohibited grounds of discrimination in the Code in 2012, but which are not expressly defined in the legislation. The Policy sets out numerous definitions, including the following (from the Summary):

> **Gender identity** is each person's internal and individual experience of gender. It is their sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex. Gender identity is fundamentally different from a person's sexual orientation.
>
> **Gender expression** is how a person publicly presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender.
>
> **Trans** or **transgender** is an umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms. It includes but is not limited to people who identify as transgender, trans woman (male-to-female MTF), trans man (female-to-male FTM), transsexual, cross-dressers, or gender non-conforming, gender variant or gender queer.

In the Summary, the Commission recognizes the reality that:

> People who are transgender, or gender non-conforming, come from all walks of life. Yet they are one of the most disadvantaged groups in society. Trans people routinely experience discrimination, harassment and even violence because their gender identity or gender expression is different from their birth-assigned sex.

The Policy is written in a easily understood, plain-language style, and contains lots of useful information on discrimination and harassment related to gender identity and expression. It draws extensively on judicial and tribunal case law, but also references other sources, such as survey results, articles, and other Commission policies. In addition, the Policy sets out numerous illustrative examples, some of which are rooted in reality and others which are hypothetical. Many issues of relevance to workplaces are discussed through the lens of gender identity and expression, such as systemic discrimination, poisoned environments, the duty to accommodate, *bona fide* requirements, undue hardship, competing rights, and liability. Employment-specific topics, including hiring and issues related to employees in the process of transitioning to their felt identity, are also covered.

A major focus of the Policy is measures that can be taken to prevent or respond to discrimination. A variety of important areas are canvassed, such as inclusive dress codes and washroom usage. There is a helpful glossary of terms and even an extensive best practices checklist in the appendices.

The Policy is available at: http://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression.

Q & A

Are Students Who Are Hired for the Summer Subject to Employment Insurance Deductions?

If the students are replacing regular employees and are remunerated by the hour, week, or other regular wages, there is an employee-employer relationship between the students and the employer. In such a case, the students would be subject to the regular statutory deductions.

The employer must deduct income taxes (based on the student's TD1 completion), Canada Pension Plan (if age 18 or over), and Employment Insurance according to the Canada Revenue Agency's rules and regulations.

RECENT CASES

Employee's Ultimatum To Quit Unless he Received a Pay Raise Was Treated as a Resignation

Supreme Court of Nova Scotia, January 23, 2014

Kerr was employed as the parts manager for Valley Volkswagen. He asked for a salary increase on a number of occasions, and was informed each time that any raise in his salary would require better job performance and a resolution of concerns Valley Volkswagen had about excess parts inventory. When Kerr's assistant was injured, she was replaced with the owner's brother, who Kerr felt was neither experienced nor competent, and who interfered with Kerr's work. Kerr complained to his supervisor about the situation and threatened that he would quit if he was not given a raise. Over the next three weeks, Kerr did not retract his threat or resolve the excess inventory problem identified by Valley Volkswagen. At this point, Valley Volkswagen informed Kerr it had accepted his resignation. Kerr brought a wrongful dismissal application.

The application was dismissed. Kerr's threat to resign was made in clear and unambiguous terms. A reasonable person would have understood that Kerr was serious in his intention to resign and take up another job opportunity that would pay more if he was not given the demanded raise. Therefore, Kerr quit and was not terminated.

Kerr v. 2463103 Nova Scotia Ltd., 2014 CLLC ¶210-019

Employee Was Not Constructively Dismissed and Letter Sent by Her Lawyer Amounted To a Repudiation of the Contract of Employment

Nunavut Court of Justice, January 17, 2014

Kucera moved from Toronto to Iqaluit to take a position as executive assistant to the president and chief executive officer of Qulliq Energy Corporation ("Qulliq"). There was tension between the director of human resources (the "director") and the corporate secretary and the corporate legal counsel. Kucera found it difficult to deal with the ongoing tension and mistrust, and discussed her concerns with the president and director. At the same time, Qulliq was undergoing a full operational review to determine possible restructuring to improve efficiency. Three positions were downgraded as a result of the review, one of which was executive assistant to the president and chief executive officer. Kucera's job responsibilities were also redistributed, such that she was no longer required to prepare briefing notes for the Minister responsible for Qulliq for employees other than the president. Kucera took over the corporate secretary duties in addition to her own when the position became vacant. Six months after starting, Kucera received a raise in salary. Issues with the director of human resources continued, and a mediation set up to deal with the issues resolved nothing. While Kucera was away on a scheduled vacation, the corporate secretary position was posted, and the application period was scheduled to end prior to her return to work, even though she had expressed interest in applying for the position. Kucera's legal counsel sent a letter to Qulliq, indicating that she was in a position to pursue a constructive dismissal complaint, and that she would be willing to enter negotiations regarding a termination package. Qulliq responded to this letter by informing Kucera that the letter amounted to insubordination and that she was being terminated. Kucera believed she had been constructively dismissed and brought an action.

The action was dismissed. While the position of executive assistant to the president and chief executive officer was downgraded to a lower pay scale, Kucera received a substantial salary increase six months after starting work, and there was no evidence that she would be ineligible for future increases. Her job responsibilities with respect to preparing briefing notes for the Minister changed, although this was the only aspect of her job description that changed, and it did not impact her status within the organization. Kucera was given additional duties as well, indicating that Qulliq had a high level of confidence in her abilities. The relationship between the director of human resources and Kucera was difficult, although it did not constitute a hostile work environment. Therefore, Kucera was not constructively dismissed. The letter sent by Kucera's lawyer to Qulliq asking for discussions about a termination package constituted a repudiation of the employment contract.

Kucera v. Qulliq Energy Corp., 2014 CLLC ¶210-020

Since the "Real Basis" for an Arbitrator's Decision was his Interpretation of the Collective Agreement, the Court of Appeal Lacked Jurisdiction To Review the Decision

British Columbia Court of Appeal, December 13, 2013

The Okanagan College Faculty Association (the "union") represented college professors and other education professionals employed by Okanagan College (the "College"). As set out in the collective agreement, the accrual of teaching load units ("TLUs") determined when a term instructor would be eligible for conversion from a term appointment to a continuing appointment. The College denied two term instructors credit for TLUs during the periods they were on maternity or parental leave. The union brought a grievance on behalf of the two employees. The arbitrator found that TLU credit for term instructors was premised on the completion of the actual teaching, and TLUs could not be collected by employees on leave and not preparing or delivering a course during the leave. In addition, the arbitrator found there was no *prima facie* discrimination, since the denial of TLU credit was based on the non-performance of the work required for the preparation and delivery of courses, rather than the protected characteristics of sex and family status. The grievance was dismissed, and the union brought an appeal.

The appeal was quashed, as the Court did not have the jurisdiction to review the arbitrator's decision. The real substance of the dispute was whether, under the collective agreement, credit for a TLU was based on the performance and completion of work. In determining this issue, the arbitrator reviewed the collective agreement to determine whether a TLU was an earned benefit after the completion of work, or one associated with an instructor's status or employment. He also had to review legal human rights principles to determine if the denial of TLUs violated the *Human Rights Code*. The arbitrator was not interpreting the legislation or developing a legal framework. Rather, he was applying a range of well-settled legal tests to a specific set of facts. The real basis of the award was the interpretation of the collective agreement, and an application of human rights legislation to the factual and interpretive conclusions with respect to the collective agreement. Therefore, the Court of Appeal was without jurisdiction to hear the appeal.

Okanagan College Faculty Association v. Okanagan College, 2014 CLLC ¶220-018

Certain Provisions in the *Education Improvement Act* Were Declared Invalid and the British Columbia Teachers' Federation Was Awarded $2 Million in Damages

Supreme Court of British Columbia, January 27, 2014

The province of British Columbia (the "government") enacted Bill 28, which voided negotiated collective agreement terms for teachers dealing with class size and composition, and prohibited collective bargaining over the same subject matter in the future. The Supreme Court of British Columbia determined that the legislation infringed the teachers' freedom of association, and declared the legislation unconstitutional and invalid, although the declaration was suspended for one year ("Bill 28 Decision"). No appeal was taken from this decision. One year later, the government enacted new legislation ("Bill 22"), which repealed the legislation dealt with in the Bill 28 Decision, and then re-enacted the provisions which had previously been declared unconstitutional in essentially identical terms. Bill 22 voided the same terms of the parties' collective agreement, retroactive to July 1, 2002, and prohibited the parties from bargaining the subject matter of the terms, although the prohibition on collective bargaining was limited, and set to expire by June 30, 2013. The government claimed the legislation was not unconstitutional, since it had engaged in discussions with the British Columbia Teachers' Federation (the "union"), and the prohibitions on collective bargaining were time limited. The union brought an action to find Bill 22, and related legislation, unconstitutional.

The action was allowed, and the legislation was declared unconstitutional. In the discussions between the government and the union, the government was not acting as an employer. Rather, the discussions were best characterized as settlement discussions over outstanding issues arising from the consequences of the Bill 28 Decision, specifically the union's claim for damages. In addition, not all of the affected parties were at the negotiations table. As a result, the negotiations were not relevant to the issue of whether Bill 22 was unconstitutional. Even if the negotiations were relevant, the government was not bargaining in good faith. The government did not engage in meaningful dialogue, listen to employees' representations, avoid unnecessary delay, or make a reasonable effort to reach an agreement. The

government had a strategic plan for a teachers' strike in order to gain a political advantage in imposing legislation that may not have otherwise been supported by the public. The time limit for the legislative ban on collective bargaining did not affect the argument that Bill 22 was unconstitutional, since Bill 22 constituted a substantial interference with the freedom of association rights of teachers. The government discussions with the union did not satisfy the minimal impairment test, and therefore the legislation was unconstitutional. The working conditions clauses were returned to the collective agreement as of July 1, 2002, and were matters for collective bargaining. The union was also awarded $2 million in damages.

British Columbia Teachers' Federation v. British Columbia, 2014 CLLC ¶220-019

Portions of Lower Court's Order Stayed Pending the Resolution of the Government's Appeal

British Columbia Court of Appeal, February 26, 2014

The government of British Columbia (the "government") enacted Bill 28, which negated a number of collective agreement terms for teachers dealing with class size and class composition conditions, and prohibited collective bargaining on those matters in the future. The Court determined that the legislation violated the teachers' right to freedom of association by substantially interfering with their collective bargaining. The Court found the legislation unconstitutional, although it suspended the declaration for 12 months. At the end of the 12-month period, the government enacted new legislation, the *Education Improvement Act*, known as Bill 22. This legislation repealed Bill 28, and then re-enacted nearly identical provisions, although the prohibition on collective bargaining was time limited, ending June 30, 2013. The British Columbia Teachers' Federation (the "union") brought an action, and the trial judge found the duplicative provisions of Bill 22 unconstitutional. The collective agreement provisions dealing with working conditions were restored to what they were on July 1, 2002 (see 2014 CLLC ¶220-019). The government appealed and brought an application for a stay of the declaration of unconstitutionality, pending the resolution of its appeal.

The application was allowed. The legal issues raised on appeal were serious questions. At issue was whether, and in what circumstances, the right to freedom of association gave constitutional protection to concluded collective agreements, as well as issues concerning the appropriate constitutional remedy when the effect of the remedy would reintroduce the terms of a historic collective agreement, even though the parties negotiated new collective agreements in the interim. Failure to provide the stay would result in irreparable harm, since the impact of the lower court judgment would vary from school district to school district, and would be a substantial financial and disruptive force in the ability of the districts to provide education services. Implementing the former collective agreement language would require hiring more teaching staff, providing more classroom space, and would result in a serious disruption to school programs. The balance of convenience favoured granting the stay as well. Using bargaining to resolve potentially irreparable harm was unrealistic, and there was not enough time to resolve the conflicts through bargaining prior to the new school year. In addition, the distribution of un-redacted written submissions made by the union was stayed pending the appeal.

British Columbia Teachers' Federation v. British Columbia, 2014 CLLC ¶220-020

Fifty-Three-Year-Old Roofer Who Was Laid Off Shortly After Younger Employees Were Hired Was Discriminated Against on the Basis of Age

British Columbia Human Rights Tribunal, December 23, 2013

Price, a 53-year-old, worked on and off for Top Line Roofing Ltd. ("Top Line") as a journeyman roofer for over 15 years. Most recently, he worked for Top Line from July 8, 2008 until he was terminated on July 24, 2012. He was informed that he was being laid off because of a shortage of work. Three other employees were laid off at the same time; a journeyman who was in his sixties and two labourers in their twenties. Price believed that the lay-off was permanent, since Top Line had just hired some new, younger employees, and had laid off the two oldest journeymen employees. Since roofing was a seasonal occupation, it was difficult for Price to find other work in July and he was not hired for two months. Price brought a human rights complaint alleging discrimination on the basis of age.

The complaint was allowed. Top Line hired a journeyman and two apprentices in April 2012, all of whom were younger than Price. Then, on July 24, Top Line laid off its two oldest journeymen. This was sufficient to infer that age was a

factor in the termination of Price's employment. Top Line claimed that Price was laid off for a shortage of work, even though there was no explanation as to why the older journeymen were terminated after hiring younger employees a few months earlier. There was no evidence of performance issues that would justify laying Price off, nor was he the employee with the least seniority. Therefore, he was discriminated against on the basis of age. He was awarded two months' lost wages, equal to $11,861.48.

Price v. Top Line Roofing Ltd., 2014 CLLC ¶230-014

Employee Was Terminated for Frustration of Contract, Not Out of Retaliation for Filing a Human Rights Complaint

Human Rights Tribunal of Ontario, January 6, 2014

James Campbell Inc. operated nine McDonald's restaurants, including one in Lakefield ("Lakefield McDonald's"). Gahagan worked at the grill station at the Lakefield McDonald's for seven years, until she twisted her back at work. She was given full loss of earnings benefits from the Workplace Safety and Insurance Board ("WSIB") from the date of her injury. Given Gahagan's physical limitations and the small size of the restaurant, Lakefield McDonald's informed the WSIB Return to Work Specialist that it would not be able to accommodate Gahagan. The specialist determined that Lakefield McDonald's had not cooperated in the return to work process. Gahagan completed a labour market re-entry program to work in customer service. Subsequently, Gahagan was approved for a Canada Pension Plan disability pension and qualified for long-term disability benefits. Gahagan was terminated for frustration of contract, since Lakefield McDonald's believed she could not return to work, with or without accommodation. Gahagan brought a human rights complaint alleging discrimination on the basis of physical disability, and following her termination, another alleging reprisal.

The complaint was dismissed. Gahagan had significant physical restrictions when she attempted to return to work. She could not twist or bend, and she could only stand for 10 minutes and sit for five minutes. Lakefield McDonald's was a small restaurant, and was not able to provide a chair at Gahagan's grill station given the physical space available, nor could it hire a shadow for Gahagan as required. Therefore, Gahagan was incapable of performing the essential duties of her job because of the nature of her physical restrictions. Gahagan was terminated when the restaurant concluded that she could not return to work with or without accommodation, given her permanent medical restrictions. This conclusion was supported by the evidence, as Gahagan had significant physical restrictions when she first attempted to return to work, and these physical restrictions remained in place. At the date of termination, Gahagan could not work with accommodation in her position. Lakefield McDonald's did not intend to retaliate against Gahagan by terminating her employment or delaying the filing of its statement for the long-term disability application.

Gahagan v. James Campbell Inc., 2014 CLLC ¶230-015

DID YOU KNOW . . .

. . . That New Brunswick's Department of Post-Secondary Education, Training and Labour Has Posted Employment Standards Videos?

Two employment standards videos are available on the website of New Brunswick's Department of Post-Secondary Education, Training and Labour. Both videos are brief (each is approximately two minutes long) and informative. They are entitled "Employment Standards (Your rights and responsibilities)" and "How to file an employment standards complaint".

The videos may be found at: http://www2.gnb.ca/content/gnb/en/departments/post-secondary_education_training_and_labour/Labour/content/EmploymentStandardsVideos.html.

THE ECONOMY

The statistics below provide a convenient overview of the latest Consumer Price Index (CPI) and other economic and labour indicators of interest. Do you need detailed CPI figures for all of Canada, individual provinces, regional cities, or specific goods and services (e.g., housing, food, and transportation)? If so, you can find the detailed CPI figures in the "Consumer Price Index" tab division of Volume 1 at ¶26 *et seq.*

Cost of Living — *Up*

The Consumer Price Index figure for March 2014 on the 2002 = 100 time base, was **124.8**, up 1.5% from the March 2013 figure of 122.9. On a monthly basis, the March 2014 percentage figure was up 0.6% from February 2014. On the 1992 = 100 time base, the March 2014 All-Items figure was **148.6**.

Industrial Production — *Up*

The preliminary, seasonally adjusted figure of industrial production for the month of January 2014, in chained 2007 dollars, was estimated at $347,619 million, up 3.4% from the revised January 2013 figure of $336,172 million.

Weekly Earnings — *Up*

In January 2014, the average weekly earnings (including overtime), seasonally adjusted at the industrial aggregate level were $924.77, up 3.0% from $897.82 in January 2013, according to a preliminary estimate based on a sample survey of reporting units.

Unemployment — *Down*

For March 2014, the seasonally adjusted number of unemployed persons totalled 1,325,400, down 17,700 from February 2014, with an unemployment rate of 6.9% of an active labour force of 19,158,600. The employment level in March 2014 was 17,833,200.

Work Stoppages — *Down*

For major collective bargaining agreements (those with 500 or more employees) in February 2014, there were 26,580 person days lost from two work stoppages. For February 2013, there were 33,501 person days lost from 16 work stoppages.

LABOUR NOTES

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Notice: *This material does not constitute legal advice. Readers are urged to consult their professional advisers prior to acting on the basis of material in this newsletter.*

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