FMC LAW

Focus on
Employment | Labour

JANUARY 2011

News and Trends in Labour and Employment Law

The Labour and Employment Law Practice Group of Fraser Milner Casgrain LLP (FMC) Montréal is pleased to send you the January 2011 edition of its electronic newsletter.

The Supreme Court Renders Decisions That Will Have a Significant Impact on Claims that Involve Wrongful Dismissal Brought by Employees with a Precarious Status

By Marie-Noël Massicotte and Sandrine Thomas

In our September 2008 issue of the Focus newsletter, we informed you of several decisions in which the Court of Appeal[1] held that the *Commission des relations du travail* ("C.R.T.") has exclusive jurisdiction to rule on complaints submitted by unionized employees pursuant to section 124 of the *Labour Standards Act*[2] ("L.S.A.") when the employees have two years of uninterrupted service and, due to their precarious status, do not have access to the arbitration procedure provided for in their collective

[1] *Quebec (Attorney General)* v. *Syndicat de la fonction publique du Québec,* D.T.E. 2008T-513 (C.A.); *Quebec (Attorney General)* v. *Syndicat de la fonction publique du Québec,* 2008 QCCA 1046 (C.A.); *Syndicat du personnel de soutien de la Commission scolaire des Sommets (CSN)* v. *Commission scolaire des Sommets,* 2008 QCCA 1055 (C.A.); *Syndicat des professeurs et professeures de l'Université du Québec à Trois-Rivières* v. *Université du Québec à Trois-Rivières,* 2008 QCCA 1056 (C.A.); *Syndicat des professeurs du Cégep de Ste-Foy* v. *Quebec (Attorney General),* 2008 QCCA 1057 (C.A.).

[2] R.S.Q., c. N.1-1.

agreement. On July 29, 2010[3], the Supreme Court rendered three decisions on the appeals lodged against the 2008 decisions.

These cases raise the issue of the types of recourse available to employees with a precarious status who have had two years of uninterrupted service with the same employer when their employment is terminated. The Supreme Court had to determine whether the C.R.T. or the grievance arbitrator has jurisdiction in such cases.

The Supreme Court decided unanimously that section 124 L.S.A. is not implicitly incorporated in every collective agreement. However, the section remains a public order standard. For this reason, the majority judges held that collective agreement clauses depriving employees with two years of uninterrupted service the right to contest wrongful dismissal are invalid and must be deemed void.

To determine whether the C.R.T. or the grievance arbitrator has jurisdiction to rule on an employee's claim, it is therefore advisable to verify whether the collective agreement, as amended by the cancellation of the clauses deemed void, contains a form of recourse equivalent to that provided by section 124 L.S.A. Even if the remedy is not identical, it will be considered equivalent if it allows the arbitrator to review the employer's decision and to impose appropriate penalties (cancelling the dismissal, reinstating the employee, setting compensation levels). If the grievance and arbitration procedure is equivalent, the arbitrator must hear the grievance. Only in the absence of an equivalent recourse in the collective agreement does the C.R.T. have jurisdiction. In the decision in one of the cases in point, *Syndicat de la fonction publique du Québec v. Quebec (Attorney General)*, the majority of the Supreme Court considered the relevant collective agreement clauses to be absolutely null in that they deprived casual and probationary employees of the right to contest dismissal without good and sufficient cause after two years of uninterrupted service. The majority of Supreme Court judges concluded that because the collective agreement contained an arbitration procedure equivalent to the procedure in section 124 L.S.A., the grievance arbitrator had jurisdiction. The dissenting judges, meanwhile, held that the collective agreement clauses restricting access to arbitration for casual and probationary employees did not contravene public order because they did not deprive these employees of their rights and recourse in accordance with section 124 L.S.A. Given the restrictions on exercising the right to arbitration, the dissenting judges concluded that only the C.R.T. had jurisdiction to preside over cases involving wrongful dismissal of casual and probationary workers.

In the decision in *Syndicat des professeurs et des professeures de l'Université du Québec à Trois-Rivières*, the Supreme Court applied the principles that emerged from majority opinion in the *Syndicat de la fonction publique du Québec* decision and rejected the appeal, concluding that the grievance arbitrator had jurisdiction because a remedy equivalent to section 124 L.S.A. was present in the collective agreement. The Court sent the case back to the arbitrator to be ruled on its merits. In the decision in *Syndicat des professeurs du Cégep de Ste-Foy*, the Supreme Court considered that the relevant clause in the collective agreement, dealing with the removal of a teacher from the employment priority list, pertained to a particular type of termination of employment and was not contrary to public order. The Supreme Court rejected the appeal, thus confirming the arbitrator's decision that the teacher's removal was based on reasonable grounds and that the arbitrator did not have jurisdiction to rule on section 124 L.S.A.

[3] *Syndicat de la fonction publique du Québec v. Quebec (Attorney General), 2010 CSC 28; Syndicat des professeurs du Cégep de Ste-Foy v. Quebec (Attorney General)*, 2010 CSC 29*; Syndicat des professeurs et des professeures de l'Université du Québec à Trois-Rivières v. Université du Québec à Trois-Rivières*, 2010 CSC 30.

New Provisions to Address Workplace Violence and Harassment in Ontario Came into Effect on June 15, 2010

By Marie-Noël Massicotte and Sandrine Thomas

On December 15, 2009, Bill 168 to amend Ontario's *Occupational Health and Safety Act* received Royal Assent[4]. The measures for this new Act came into effect on June 15. The Ontario *Occupational Health and Safety Act*[5] as amended ("**OHSA**"), introduces new obligations for employers regarding violence and harassment in the workplace.

The concepts of workplace violence and workplace harassment are defined by the OHSA as follows:

> "Workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.
>
> "Workplace violence" means:
>
> a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
>
> b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker;
>
> c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

The employer must assess the risk of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work, and inform workers of the results of this assessment. Risk must be re-evaluated as often as necessary.

The employer must also draw up a policy regarding workplace violence and harassment, and this policy must be re-examined as often as necessary and at least once per year. Unless the number of people regularly employed in the workplace is equal to or less than five, the policy must be written up and posted in a conspicuous location in the workplace. The employer must develop a policy implementation program whose core content is determined by the OHSA.

The OHSA also requires the employer to protect workers from domestic violence. If an employer is aware or ought reasonably to be aware that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer must take every precaution reasonable in the circumstances to protect the worker.

In addition, the employer has the duty to provide workers with information, including personal information, about the risk of workplace violence from a person with a history of violent behaviour. This information must be provided if the worker can be expected to encounter that person in the course of work and is likely at risk of physical injury.

Workers may also refuse to work or to carry out a particular task if they have reason to believe they are in danger of workplace violence. The right to refuse work, however, does not apply to professions where danger is inherent in the work or is a normal condition of employment, or when refusing to work, in such a profession, would endanger the life, health or safety of another person.

A failure to respect the duties imposed on employers by the OHSA can result in a fine of up to $25,000 and/or imprisonment of up to 12 months for natural persons, and a fine of up to $500,000 for legal persons. In addition, the name of a natural or legal person convicted of an

---

[4] *Act to amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace*, S.O. 2009, c. 23.

[5] R.S.O. 1990, c. O.1.

offence may be published, along with a description of the offence, the date of the conviction and the person's sentence.

Taking Vacation Time during the Reference Year does not Entitle Employees to Vacation Pay upon Termination of Employment

By Marie-Noël Massicotte and Sandrine Thomas

Since May 1, 2003, section 70 of the Labour Standards Act[6] ("L.S.A.") has allowed annual vacations to be taken during the reference year at the employee's request. What happens when vacations are taken during the reference year at the request of the employer?

In the recent *Nestlé*[7] case, which involved employees who took annual vacations in advance at the employer's request, the Court of Appeal ruled that the employer was not required to pay for vacation time again when employment terminated.

The case involved two employees who gave their notice in the fall of 2005. The Commission des normes du travail took legal action against the employer on the grounds that the vacation time taken at the employer's request during the reference year did not constitute annual vacation as defined by the L.S.A., and that the employees were therefore entitled to vacation pay for the year in question.

At trial, the Court of Quebec ruled that the employer needed to establish that the advance leave had been taken at the employees' request, which the employer was unable to do. The Court concluded that the employer's policy, while generous, contravened L.S.A. provisions. Therefore, by granting vacation time during the reference year, the employer was in no way reducing its obligation to provide vacation pay corresponding to that period when employment terminated[8].

The Court of Appeal allowed the appeal of this decision. It struck down the Court of Quebec's judgement that the pay provided for vacations taken in advance constituted a gift from the employer, as this argument had no legal basis. In addition, no financial loss was suffered by the employees as a result of taking early vacation time, because they had been paid at that time. The L.S.A. has no provision for granting compensation in cases where the violation of one of its provisions does not result in any financial loss. Finally, the employees did not successfully demonstrate that the employer's violation of the L.S.A. had caused them any difficulty or inconvenience that would justify awarding damages.

Contact us

For further information, please contact a member of our Montréal Employment|Labour Group.

[6] R.S.O., c. N-1.1.

[7] *Nestlé Canada Inc.* v. *Commission des normes du travail*, D.T.E. 2009T-838 (C.A.).

[8] *Commission des normes du travail* v. *Nestlé Canada Inc.*, D.T.E. 2008T-282 (C.Q.).