2014 in Review: Developments in Canadian Labour and Employment Law

By: Frank Portman and Jessica Young

In 2014 we saw some significant changes to Canadian labour and employment law. New judicial decisions and statutes changed longstanding legal principles, and employees and their counsel attempted to use new mechanisms to vindicate their claims. We have selected the following top ten developments from 2014 with which all human resources professionals should be familiar.

1. WSIAT Rules Mental Stress Provisions Unconstitutional

Since 1997, the *Ontario Workplace Safety and Insurance Act* ("WSIA") restricted entitlement for workers claiming mental stress to situations where a worker had suffered an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment. A worker was not entitled to benefits for traumatic mental stress that were a result of the employer's employment decisions or actions.

However, in May of 2014, the Workplace Safety and Insurance Appeals Tribunal ("WSIAT"), in *Decision 2157/09,* found that the restrictions on entitlements for mental stress were unconstitutional and in violation of the *Charter of Rights and Freedoms* (see our update on that decision here).

The Crown has since decided not to appeal the finding of unconstitutionality. While the mental stress provisions remain on the books, it seems quite unlikely that WSIAT will rely on them to determine the scope and nature of any worker entitlements given this ruling.

There does not seem to be any push from the WSIB to revise the policy, nor from the legislature to amend the law. It appears a judicial review of the provision may be necessary to finally determine the legality of the mental stress provisions, but such a judicial review will have to stem from a different claim.

Until then, this decision could lead to a noticeable increase in the number of claims being brought under WSIA, as it has broadened the class of eligible workers.

2. Ministry of Labour Cracks Down on Internships

In May of 2014, the Ministry of Labour began its spring enforcement blitz, targeting sectors of the economy in which internship programs are common. Unpaid internships are only permitted in Ontario under specifically defined exclusions. If positions do not fall under one of these exclusions, they are subject to the *Employment Standards Act, 2000* (the 'ESA") in its entirety, including termination pay, vacation and minimum wage etc.

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As a result of the blitz, the long-standing internship programs at Toronto Life and the Walrus were scuttled. The blitz eventually resulted in the issuance of 37 compliance orders, and demands by the Ministry that employers pay $48,000 in back pay (see our blog on the results of the blitz here).

It appears that the crackdown on internships that may not qualify for ESA exclusions may be a continuing priority for the Ministry.

3. The Rise of Employment Class Actions Continues

The rise in prominence of class actions in relation to employment law continued in 2014. New and unprecedented class actions spanning both employee entitlements as well as privacy concerns occasioned by employee misconduct were brought before the Courts. Some settled, while others survived appellate scrutiny (see our blog on one such settlement here and our blog on a novel class action filed against the Canadian Hockey League here).

In any event, it has become clear that class actions are a new tool in employee-side lawyers' toolbox, and they are not going away. Employers should be wary that their organizational policies do not run afoul of the law. If they do and a number of employees are affected, even relatively minor breaches of legislation could aggregate to form class actions that will require substantial expense to defend or settle.

4. Family Status Accommodation is Refined

The final chapter in the saga of Fiona Johnstone, the Border Services employee at the centre of the litigation in *Johnstone v Canada*, was decided by the Federal Court of Appeal in May of 2014. The Court's decision set out a new, refined test for discrimination on the basis of family status, answering the question of whether child care obligations are protected by human rights legislation with a resounding *yes* (see our blog on the decision here). Although the extent of the repercussions of that case are still unknown, the news that the Federal government chose not to appeal the decision to the Supreme Court means that, for now, *Johnstone* is the most current and applicable law in Canada relating to the intersection of family status discrimination and childcare obligations.

5. Human Rights Damages Increase Exponentially

The last two years have seen a noticeable rise in the damages being awarded by human rights tribunals across the country. Where a termination has been seen to be the result of discriminatory acts by an employer, tribunals have been comfortable awarding multiple years of back-pay in full. Notably, in *Fair v Hamilton-Wentworth School Board*, the Ontario Human Rights Tribunal awarded ten years of cumulative back-pay.

In addition to the increase in back-pay damages, human rights general damages have also been on the rise, reaching up to $75,000 before the British Columbia Human Rights Tribunal and $125,000 before an Alberta labour arbitrator. These damages could also be awarded by a court, as we have recently seen for the first time (see our update on this trend here).

It seems likely that this increase in damages will see an increase in employment related litigation before human rights tribunals, as well as an increase in the number of civil litigation cases in which a human rights aspect is pleaded.

6. AODA Compliance

December 31st, 2014 was the deadline for large private sector employers (those with 50 or more employees in Ontario) to file an Accessibility Report. The Accessibility Report is a self-reporting mechanism to monitor compliance with the Accessibility for Ontarians with Disabilities Act, 2005 (the "AODA").

The AODA contains five accessibility standards with rolling deadlines. All organizations, public sector and private sector, have had to be compliant with the Customer Service Standard since at least January 1, 2012. However, the requirements under the Integrated Accessibility Standard are being phased in over time (see our update on these requirements here).

In 2014, we also saw the first AODA enforcement decisions from the License Appeal Tribunal. Four decisions were released this summer. All four decisions pertained to the failure to file an Accessibility Report (for more information on these decisions please see our blog here).

7. Canadian-Anti Spam Legislation Comes Into Force

On July 1, 2014, the much-maligned *Canadian Anti-Spam Legislation* (or "CASL") came into effect. With its draconian penalties of up to $10,000,000 per violation by a corporation, as well as its many ambiguous definitions and provisions, the corporate community scrambled to comply before CASL came into force.

Now the deadline has passed, and an eerie silence has fallen over those same concerns. CASL's provisions, which allow the government to hold corporations liable for violations by their employees, are of great concern to employers given the magnitude of penalties and the myriad of ways that even a well-meaning employee could be interpreted to run afoul of the law (see our update on potential liability for employers under CASL here).

These concerns will only increase in importance as we move towards July 1, 2017, when private parties gain the rare ability to sue for breaches of the legislation..

8. Overhaul of the Temporary Foreign Workers Program

In 2014, we saw significant changes to the Temporary Foreign Workers program. These changes came on the heels of other changes that were implemented in 2013. Notably, the Government tightened the restrictions on the Labour Market Opinion process, which is now called the Labour Market Impact Assessment process.

The new Labour Market Impact Assessment process includes higher fees, more scrutiny of domestic recruitment, and caps on the number of temporary foreign workers in the low-wage category. The net result of these changes is that it is increasingly difficult to bring foreign workers to Canada on a temporary basis (see our updates on these changes here and here).

9. Bill 18 is Given Royal Assent

In 2013, the provincial government proposed Bill 146, the *Stronger Workplaces for a Stronger Economy Act* (see our update on Bill 146 here). Although Bill 146 fell by the wayside as the provincial election was called, following the re-election of the Liberal government, the Bill was reintroduced as Bill 18. It received Royal Assent on November 20, 2014.

Bill 18 increases the Ontario minimum wage applicable to most workers to $11.00 per hour, and established future increases to be governed by the Consumer Price Index.

It also makes temporary help agencies and their clients jointly and severally liable for the payment of workers' wages, as well as other benefits required by the ESA.

The *Occupational Health and Safety Act* also saw amendments which bring student co-op and intern students, as well as trainees within the protections accorded to workers under that *Act*.
The "open period" for employee applications to terminate union bargaining rights in the construction industry was narrowed to 60 days from 90.

10. Ontario Severance Pay Entitlements

In Ontario, employees with more than five years' service are entitled to severance pay if at relevant times their employer had a payroll of over $2.5 million. Even without a payroll over $2.5 million employers may owe severance pay when at least 50 employees are terminated within a rolling six month period.

In the past, it was understood that the determination of whether or not an employer had a payroll of over $2.5 million was only based on payroll within Ontario, not other jurisdictions in Canada. This is supported by 2011 decisions ***Altman v Steve's Music Store***. However, in the 2014 decision ***Paquette v Quadraspec Inc.***, the Ontario Superior Court disagreed, holding that the eligibility for severance pay should be based on an employer's national payroll (see our update on this decision here).

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Please join us for our complimentary Q4 Quarterly HR-Law Webinar, on Wednesday, January 21, 2015 from 12:00 to 1:00 pm (ET). As always, our goal is to provide a concise, high-level summary of the most significant legal developments affecting employers from the past quarter, and to provide practical tips and guidance on how to respond to them.

Topics to be covered:

1. Recent decisions on just cause terminations
2. Bill 18 - Significant changes in employment standards, OHS, and workers' compensation
3. New leaves under the *Employment Standards Act, 2000*
4. Update on forum shopping at the Human Rights Tribunal

We hope you will join us!
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UPDATE is an electronic publication of Stringer LLP
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