2015 in Review: Developments in Canadian Labour and Employment Law

By: Jessica Young and Frank Portman

2015 was a busy year for those following developments in labour and employment law. Along with groundbreaking new cases, 2015 also saw legislative changes and the coming-into-effect of new regulatory regimes. This is our list of the top 10 developments in this area of law for 2015.

1. Conviction for Criminal Negligence in Workplace Accident

2015 brought another first in the trend towards the criminalization of health and safety violations with the conviction of a supervisor. That supervisor was in charge of the site of the infamous Metron Construction collapse of a swing stage that killed four workers and permanently maimed a fifth. In August, the supervisor was convicted of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm (see our update on that decision here). In early 2016, he was sentenced to three and a half years in prison (see our blog post on the sentencing decision here).

This case continues the trend towards the criminalization of health and safety offences, which is certainly something employers, and particularly managers and supervisors, will want to watch in 2016.

On February 4 at noon Ryan Conlin and Frank Portman of Stringer LLP will be hosting **Surveying the Aftermath**, a complimentary webinar, analysing the impact of the decision in **Kazenelson** and the other cases in the Metron saga on the occupational health and safety regime in Ontario and beyond. To register for free, please sign up here.

2. Novel Notice Cases

Several cases in 2015 dealt with novel situations in which courts were asked to assess a terminated employee's notice entitlement.

In one case, **Michela v St Thomas of Villanova Catholic School**, the Court of Appeal confirmed that an employer's economic circumstances do not serve to reduce the notice period to which a dismissed employee is entitled. This is so even if the purpose of the termination was solely in response to those economic circumstances (see our blog post on this decision here).

In another case, **Paquette v Terago Network,** the Court required the employer to pay a plaintiff for the balance of a notice period that had not yet concluded as of the date of the award, relying on the good faith of the plaintiff to return the excess if she successfully mitigated (see our blog post on this decision here).

Finally, in **King v 1416088 Ontario Ltd (Danbury Industrial),** the Ontario Court of Appeal reiterated that an employee's service for the purposes of determining reasonable notice can survive transfers across different corporate structures of the same organization (see our blog post on that decision here).

3. New Developments in Family Status Accommodation

The rapid evolution of the jurisprudence surrounding family status accommodation and discrimination continues in 2015.

In March, the Ontario Superior Court of Justice in **Partridge v Botony Dental Corp** endorsed the Federal Court of Appeal's test in **Johnstone v Canada** when it allowed an employee's claim for human rights damages for family status discrimination in a wrongful dismissal action (see our update here). Recently, the Court of Appeal upheld that decision, although it stopped short of endorsing the Johnstone test. Instead, the Court of Appeal held that the treatment of the Partridge had clearly been discriminatory, without outlining a specific test for that determination.

In addition, an Alberta Court of Queen's Bench upheld the controversial "shift shopping" decision in **SMS Equipment** (see our summary of the arbitrator's decision in that case here).

However, not everyone was enamored with the Johnstone test. The Ontario Human Rights Commission has challenged the test as it applies to elder care situations, calling the test "unworkable." While that decision has not yet been issued due to procedural hiccups, it remains another yet to be resolved question in an area that saw more than its fair share of change in 2015.

4. Dramatic Awards in Sexual Harassment Cases

2015 also saw the establishment of a new benchmark for damages in a sexual harassment complaint before the Human Rights Tribunal of Ontario. The decision followed a case in which the applicants successfully showed severe abuse and sexual assault at the hands of the manager of a fish processing company at which the plaintiffs worked as temporary foreign workers. One applicant received $175,000, which is the largest general damages award ever by a human rights tribunal in Canada (see our blog post on that decision here).

The courts have also endorsed significant general damages awards. In one notable decision, **Silvera v Olympia Jewelry Corporation**, a court awarded the victim of sexual harassment over $200,000 in damages for that harassment, as well as three months' notice and punitive and aggravated damages for the wrongful dismissal she had suffered.

Notably, Ontario's proposed Bill 132 would provide enhanced, express employer responsibilities to respond to claims of sexual harassment, as well as potentially eliminate all limitations periods retroactively for egregious cases in which sexual assault is alleged. If passed, it could lead to a significant upswing in sexual harassment litigation.

5. Trend Towards Large General Damage Awards Continues

2015 was another year in which courts increasingly looked to general damage awards, whether punitive, aggravated or human rights-based, in fashioning awards to employees dismissed without cause.

In one notable case, **Gordon v Altus**, an employee was awarded $100,000 in punitive damages due to the employer's failure to execute a contract with the employee in good faith (see our blog post on this decision here).

Historically, courts were (at least many had the impression they were) more reluctant to award human rights general damages in wrongful dismissal cases. As noted above, the recent trend suggests that reluctance has vanished, if it ever existed. Thus, employees who may previously have elected to proceed to court for more straightforward wrongful dismissal matters but to the Tribunal if human rights were the heart of the case, may effectively elect either procedure. Of course, at court there is the possibility of cost consequences.

6. More Changes to the Temporary Foreign Worker Program

We saw more changes to Canada's temporary foreign worker system in 2015, including a new compliance regime. These changes are part of a broader overhaul of the temporary foreign worker system.

The new compliance regime came into effect on December 1, 2015. It consists of a system of Administrative Monetary Penalties ("AMP") levied on employers for non-compliance. Non-compliance includes, for instance, failing to abide by the terms of a labour market impact assessment ("LMIA"). The severity of the penalty is determined through a matrix taking into account the nature of the violation, compliance history and severity of the violation. Although the AMP system is intended to promote compliance and not be punitive, the penalties can be quite significant (see our update on these changes here).

7. New AODA Requirements for all Ontario Employers

In 2015, we saw new requirements come into effect for all Ontario employers under the Accessibility for Ontarians with Disabilities Act, 2005 ("AODA").

Significantly, 2015 was the year of AODA Employment Standard compliance for large private sector employers (those with over 50 employees in Ontario). Commencing January 1, 2016, large private sector employers had to be compliant with the remaining requirements under the Employment Standard. All employers in Ontario were already required to be compliant with the requirement to create individualized workplace emergency response plans for employees with disabilities.

The AODA Employment Standard includes requirements at every stage of the employment relationship, including recruitment, return to work, performance management, career development and redeployment. Please have a look at our AODA resource page.

In addition, the Ministry has stepped up active enforcement of the AODA. In the fourth quarter of 2015, the Ministry ramped up AODA enforcement by conducting an audit blitz of large retailers (see our blog on the AODA Blitz here).

8. No Just Cause Protection For Federally Regulated Employees (For Now)

Whether non-union federally regulated employees are entitled to just cause protection has been an ongoing issue for many years. Conflicting decisions have resulted in great uncertainty. However, the Federal Court of Appeal sought to clarify this issue in **Wilson v Atomic Energy of Canada Limited**, finding that there was no just cause protection (see our blog on this decision here).

Not surprisingly, the issue has been appealed up to the Supreme Court of Canada. Leave to appeal was granted this past summer.

9. Constitution Found to Protect Right to Strike

When 2015 was only a month old, the Supreme Court of Canada had already released three decisions of note to the employment and labour law community. The first two of those decisions continued a trend towards the constitutionalization of the current labour relations status quo (see Mounted Police Association of Ontario v Canada and Meredith v Canada). The third case, Saskatchewan Federation of Labour v Saskatchewan, however, represents a significant watershed moment in labour litigation in Canada, and has the potential to significantly alter the legal landscape by constitutionalizing a new right for organized labour: the right to strike.

10. Supreme Court Weighs in on Suspensions and Constructive Dismissal

Employers are often surprised to learn of the risks of constructive dismissal when suspending non-unionized employees. This issue was addressed in 2015 by the Supreme Court of Canada in **Potter v. New Brunswick Legal Aid Services Commission**. In this decision, the Supreme Court found that an indefinite suspension with pay triggered a constructive dismissal.

The decision does not mean that a suspension with pay in all circumstances will result in a constructive dismissal. However, the case makes clear that an employer must have a valid business reason for putting an employee on a paid suspension. The fact that the employee continues to receive pay does not on its own provide the employer with an implied right to suspend. The employer must act honestly and in good faith. Intentionally withholding the reason for the suspension or being ambiguous about it could lead to a finding that the suspension was a breach of contract (see our blog on this decision here).

For more information please contact

Jessica Young at jyoung@stringerllp.com or 416-862-1687
Frank Portman at fportman@stringerllp.com or 416-862-8085

UPDATE is an electronic publication of Stringer LLP
390 Bay St, Suite 800, Toronto, Ontario M5H 2Y2
T: 416-862-1616 Toll Free: 1-866-821-7306

E: *info@stringerllp.com* *I:* *www.stringerllp.com*