



eLaw - Labour and Employment Law Update

October 2011 - No. 1

In This Issue

Labour Board to Reconsider Whether It Has Jurisdiction to Reopen Case: MBCA

Commission Empowered to Assist Parties in Reaching Settlement: MBQB

Noteworthy Employment Cases From Other Jurisdictions

Legislative Update

Free Online Resources

The Future of Labour Arbitration and Collective Bargaining Rights

Labour and Employment Law News

Annual Labour Law Review

National Conference: CBA

Labour Board to Reconsider Whether It Has Jurisdiction to Reopen Case: MBCA

"The public is entitled to know whether the (Labour) Board has jurisdiction to consider an excuse for nonattendance and, if it finds it sufficiently valid, to reopen its earlier decision" according to the Court of Appeal in [Akman Management Ltd. v. Bernier](#), 2011 MBCA 65. The court found that the applicant's reasons for not attending the board hearing were reasonable and understandable and granted him an extension to appeal on the following question of law: "Did the Manitoba Labour Board erroneously decline jurisdiction to consider whether its earlier decision should be reopened on the ground that the party seeking relief had a valid excuse for its nonappearance?"

Commission Empowered to Assist Parties in Reaching Settlement: MBQB

Taking a broad and purposive approach to the interpretation of s. 29(2)(b) of *The Human Rights Code*, C.C.S.M., c. H175 should allow the Human Rights Commission to facilitate the resolution of complaints through mediation according to the court in [Korsch v. The Manitoba Human Rights Commission](#), 2011 MBQB 222. Thus the board did not overstep its jurisdiction when it modified a settlement offer made by the applicant's former employer and then found it to be reasonable, thereby terminating the discrimination complaint proceedings. In assessing the offer, said the court, "the Board may identify gaps, defects or omissions and provide some constructive direction or clarification to the parties as to how these gaps, defects or omissions might be remedied to render the offer reasonable. To find otherwise would significantly impede the Commission's ability to perform its gate-keeping function under the *Code*." (para.30) The court also upheld the reasonableness of the board's decision that the employer's settlement offer was reasonable.

Noteworthy Employment Cases From Other Jurisdictions

The Ontario Court of Appeal decision in [Di Tomaso v. Crown Metal Packaging Canada LP](#), 2011 ONCA 469 is another blow to the proposition that there is a hard limit of 12 months'

notice for unskilled employees according to the author of *The Lawyers Weekly* article [No 'hard cap' on dismissal damages](#). The court upheld the lower court award of 22 months pay in lieu of notice for a mechanic who was let go when the plant he had worked in for 33 years closed. The empirical validity of the proposition that low level unskilled employees deserve less notice because they have an easier time finding alternative employment cannot be taken for granted, according to the court, particularly in today's world. (para.28) The *InHouse* article [Notice of Dismissal](#) discusses another issue raised in the case, the need to be clear when giving "working notice."

It may be even harder to enforce a restrictive employment covenant following the Alberta Court of Appeal decision in [Globex Foreign Exchange Corporation v. Kelcher](#), 2011 ABCA 240, particularly if the employee is wrongfully dismissed. The court found the covenants in this case to be overly broad, ambiguous and unenforceable. It went on to say that even a valid restrictive covenant might not be enforceable against a wrongfully terminated employee, citing the *General Billposting* principle that it would be "morally unjust to permit an employer to recoup the benefit of a contractual restraint after it has acted reprehensibly by repudiating the contract." (paras. 71 and 48)

The Ontario Superior Court decision in [Brito v. Canac Kitchens](#), 2011 ONSC 1011 may have closed the loophole many employers have used to avoid paying more generous common law severance according to *The Lawyers Weekly* article [Terminating long-term employees](#). The blog post [Is It Time to Punish Employers Who Low-Ball Notice Periods?](#) also comments on the decision. The court criticized the employer's "cavalier, harsh, malicious, reckless, outrageous and high-handed treatment" of the long time employee, who had been given the minimum statutory notice rather than the required "reasonable notice" period of 16 to 19 months. The court fixed the notice period at 22 months and awarded a further \$15,000.00 in damages for the employer's "hardball approach." (para.18)

The B.C. Supreme Court court found in favour of a 66 year old Vancouver lawyer who is fighting his law firm's mandatory retirement policy in [Fasken Martineau DuMoulin LLP v. British Columbia \(Human Rights Tribunal\)](#), 2011 BCSC 713. They upheld the B.C. Human Rights Tribunal ruling which found that partners of the law firm were employees and therefore subject to the province's human rights legislation. Details of the ongoing case are discussed in this *Lawyers Weekly* article [A law firm partner is an 'employee,' says BC court](#).

Legislative Update

These bills received Royal Assent on June 16, 2011 and will come into force as indicated:

- [Bill 6](#), *The Workers Compensation Amendment Act*, expands the list of specific illnesses and injuries presumed to be caused by firefighting to include multiple myeloma and primary site prostate, skin and breast cancers. In force on royal assent, with the exception that ss. 3 and 4 are deemed to have come into force January 1, 2011.
- [Bill 23](#), *The Employment Standards Code Amendment Act*, amends the *Code* to allow for flextime agreements, to replace the "wilful misconduct" standard to a "just cause" standard for terminating employment without notice, and to allow employers to apply for averaging permits regarding standard work hours or weeks. It also repeals the existing requirement that the director consider industry customs or practices. It will come into force January 1, 2012.
- [Bill 33](#), *The Pension Benefits Act*, amends the Act to provide additional ways to enforce its provisions and to give clear legal authority respecting multi-jurisdictional pension plans. It will come into force on January 1, 2012.

Free Online Resources

In this [post](#) on David Doorey's [Workplace Law Blog](#) he lists labour and employment law scholars who post their academic articles on [SSRN](#), the Social Science Research Network free e-Library. SSRN collects and disseminates scholarly papers on social science topics, including employment and labour law. Frequently downloaded works by Canadian labour law academics include: [The Canadian Charter of Rights and Freedoms and Workplace Law: A Guide for Beginners](#), by David Doorey; [Labour Law after Labour](#), by Harry Arthurs; [Disability and Work:](#)

The Future of Labour Arbitration and Collective Bargaining Rights

The Honourable Warren K. Winkler, Chief Justice of the Ontario Court of Appeal, has recently posted his paper [Labour Arbitration and Conflict Resolution: Back to Our Roots](#) on the Court of Appeal website. The thesis of his article is that labour arbitration has lost its course and is at risk of becoming dysfunctional and irrelevant. As an interesting aside, it was Justice Winkler who decided [Fraser v. Ontario \(Attorney General\)](#), 2008 ONCA 760, the collective bargaining case recently [overruled](#) by the SCC. The Supreme Court found that the appeal court erred in striking down the *Agricultural Employees Protection Act*, 2002 for failing to protect the collective bargaining rights of Ontario farm workers. These articles discuss the impact of the *Fraser* decision on collective bargaining rights: ?? [SCC 'ambivalent' on debate over labour rights as human rights](#), *Inhouse*; *Defining the 'Meaningful' - Collective Bargaining and Freedom of Association (Ontario (Attorney General) v. Fraser)* [Part I](#), [Part II](#), and [Part III](#), *The Court*; and [SCC reins in labour rights protection](#), *Lawyers Weekly*.

Labour and Employment Law News

These recent articles, newsletters and blogs deal with labour and employment law topics:

- [Labour & Employment Quarterly](#) - This August 2011 McCarthy Tétrault publication includes articles on [social media in the workplace](#), [employment class actions](#), and [drafting privacy policies](#).
- [First Reference Talks](#) is a multi-author blog where lawyers and other experts comment on human resources and employment law issues. This [post](#), for example, discusses a September 17, 2011 [decision](#) of the Ontario Human Rights Tribunal in which they found a law prohibiting the smoking of medical marijuana in licensed establishments to be discriminatory but justified.
- [Lawyers' letter can be perilous](#) - Be careful how you word your demand letters is the underlying message of this *Law Times* article concerning [Grewal v. Khalsa Credit Union](#), 2011 BCSC 648, a B.C. wrongful dismissal case. The judge found the demand letter by the employee's lawyer to be disrespectful and inflammatory and, since it "permanently undermined the employment relationship" it constituted just cause for dismissal.
- [Employer Monitoring Employees With GPS Tracking](#) - This [Slaw](#) post deals with the controversial issue of employers using GPS systems to track the whereabouts and activities of their employees.
- There's been an increase in the number of articles on social media use in the workplace as courts see more cases involving this issue. The articles [Old Wine in Digital Bottles - Disciplining employees for their personal social media use](#) and [Canada: Social Media Policies In The Workplace: What Works Best?](#) discuss the trend and what employers should do about it.
- This [Winnipeg Free Press op-ed](#) criticizes the Manitoba legislation ([s.85](#) of *The Employment Standards Code*) allowing employers to pay disabled workers less than minimum wage. Similar provisions exist in Alberta and Saskatchewan. The author argues that such provisions are blatantly discriminatory and should be repealed.
- The June 2011 issue of the CBA's [Labour and Employment Law Perspective](#) focuses on judicial review. It contains articles on [human rights cases](#) in Ontario and [deference in the review of arbitral decisions](#), among others.
- [IQT's Closure: A Fine Example of Poor Corporate Values!](#) - This [Slaw](#) post concerns the obligations of employers to communicate with employees pre-and post bankruptcy.

Annual Labour Law Review

The [17th Annual Manitoba Labour Law Review](#) will be held December 1 & 2, 2011 at the Hotel Fort Garry. Local presenters will review the year's top developments in labour law (including arbitration awards and Labour Board decisions) and their impact on unions and employers in Manitoba. Register [online](#) or by mail, fax or phone.

National Conference: CBA

The 12th Annual [National Administrative Law and Labour & Employment Law Conference](#), entitled "Behind Closed Doors," will be held November 25-26, 2011 in Ottawa, Ontario. Speakers from across Canada will discuss trends and developments in administrative and labour and employment law. The Right Honourable Beverley McLachlin, Chief Justice of Canada, is the lunch hour speaker. Register [online](#) or by sending in the [registration form](#).

The Law Society of Manitoba provides this service solely for the benefit of and to support the competence of its members. Members should exercise their professional judgment in using or adapting any content.