INTRODUCTION

This issue of our Newsletter covers a number of different topics that are important for trade unions and their members.

As always, please feel free to contact us with any questions you may have in relation to any of the topics covered in this Newsletter.

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A. SUPREME COURT OF CANADA CONFIRMS PROTECTION FROM UNJUST DISMISSAL FOR FEDERALLY REGULATED EMPLOYEES

Maeve Biggar

In a landmark 6 to 3 ruling in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 ("*Atomic Energy of Canada*"), the Supreme Court of Canada determined that federally regulated employees, with or without a union, cannot be dismissed without just cause.

The "just cause" standard for dismissal is a customary term of employment for unionized employees which gives labour arbitrators the jurisdiction to reinstate an employee whose termination is found to be unjustified. This is a key employment benefit that is not available to non-unionized employees working for provincially regulated employers in Ontario, who need only be given appropriate termination and severance pay under the *Employment Standards Act*, 2000 S.O. 2000, c. 41. However, for many years the courts had considered non-unionized employees of federally regulated employers – such as those in the rail and airline industries – to enjoy the protection of the "just cause" standard because of section 240 of the *Canada Labour Code*, R.S.C., 1985, C. L-2 ("the *Code*"), which provides a complaint mechanism for claims of unjust dismissal. All that changed with the Federal Court of Appeal's ruling in Atomic Energy of Canada.

The appellant in the *Atomic Energy of Canada* case was a non-unionized employee of a federal Crown corporation called Atomic Energy of Canada Ltd. ("AECL") named Joseph Wilson. After four and a half years at AECL, Mr. Wilson was terminated on a "without cause" basis and provided a severance package. Suspecting that he had been fired because he had complained about AECL's improper procurement practices, Mr. Wilson filed a section 240 complaint of unjust dismissal. The labour adjudicator assigned to the complaint sided with Mr. Wilson, but his award was quashed by the Federal Court in 2013, which found that section 240 did not actually preclude federal employers from dismissing employees without cause if they were given the minimum notice and severance pay under the *Code*. The Court, in effect, decided that federally regulated employees were no different from provincially regulated employees in Ontario when it came to termination.

After the Federal Court of Appeal denied his appeal, Mr. Wilson took his case to the Supreme Court and won. The majority confirmed that Parliament's intention with respect to section 240 of the *Code* was to afford federally regulated employees the same protection from unjust termination as that provided to unionized employees under a collective agreement.

Though this decision does not impact the rights or benefits of unionized employees, it does assist unions trying to organize federally regulated workplaces. Oftentimes when a union supporter or inside organizer is terminated during an organizing drive, it can be difficult to prove that the employee was terminated because of anti-union animus. Section 240 of the *Code* provides unions with alternative means of challenging a supporter's termination when the evidence for an unfair labour practice complaint is thin. Fortunately, the decision is *Atomic Energy of Canada* has secured this important tool for nascent organizing drives in the federal sector.

B. SOCIAL MEDIA HARASSING AND DISCRIMINATORY POSTS ABOUT EMPLOYEES BY THE PUBLIC

Micheil Russell

There are many reported arbitration decisions that consider the implications of employees using social media accounts such as Twitter or Facebook to engage in behaviour that is harassing and/or discriminatory towards colleagues. A recent arbitration decision considered the extent to which an employer is responsible to protect its employees from harassing and discriminatory posts that the public makes on the employer's Twitter account.

Like many large employers, the Toronto Transit Commission ("TTC") has created a Twitter account. A grievance was filed that complained that the Twitter account became a platform for the public (usually passengers) to make harassing and discriminatory remarks about the TTC employees. Introduced into evidence in the proceeding were hundreds of examples of customers making abusive and discriminatory tweets.

The grievance requested an order from the arbitrator that the Twitter account should be shut down. The arbitrator granted the grievance but declined to award this specific remedy. Rather, the arbitrator ordered the TTC to develop a social media policy that would address the inappropriate tweets referencing TTC employees. The order included a requirement that the TTC actively monitor its Twitter account. The steps the TTC was expected to take in monitoring the account included the following:

i. Advise individuals that any offensive tweets needed to be immediately removed or the individual making the tweet would be blocked from the TTC Twitter account.

ii. If the tweet was not immediately deleted, then the individual should be permanently blocked.

The clear implication of the case is that the requirement that employers have to provide employees with a safe and healthy environment is being extended into social media. The case clearly states that an employer has an obligation to take proactive steps to address the harassment of its employees on social media. The full decision can be read at: *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance)*, [2016] O.L.A.A. No. 267.

C. POST-INCIDENT ALCOHOL TESTING: NOT ALWAYS NECESSARY

Steven Weisman, Student-at-Law

Two cases were released in the past six months that deal with the issue of when supervisors can ask for alcohol and drug testing after an incident at the workplace.

In the first case, *Compass Minerals Canada Corp and Unifor, Local 16-0,* (2016 CanLII 51286 (ON LA)), Arbitrator Surdykowski heard arguments about a Grievor who drove a truck through a narrow and poorly marked tunnel and damaged the vehicle. When a supervisor found out the truck was damaged, he asked the Grievor to take a breathalyzer test because he deemed the accident to be 'serious.' At no point did the supervisor actually suspect that the Grievor had been impaired. The Grievor accompanied the supervisor to his office, walking past his co-workers. He blew a 0 once he took the test.

Arbitrator Surdykowski canvassed the case law surrounding breathalyzer tests and simplified the previous six-part test developed in *Weyerhauser No. 2* to these two questions:

> "1. Is there reasonable cause to suspect that an employee involved in a workplace incident may have been impaired by drugs or alcohol?
>
> And if so,
>
> 2. Does the appropriate balancing of employee and employer rights and interests demonstrate that the need for drug or alcohol testing outweighs the employee's privacy interest?"

Using these two questions, the Arbitrator looked at the Substance Abuse Policy itself. The Policy did not suggest that any single factor should be considered in isolation and did not require drug and alcohol testing for every "serious" accident. The policy itself was improperly applied.

Although the Arbitrator found that the breathalyzer test was an interference with the Grievor's privacy and bodily integrity, he also found that it was a *de minimus* interference and ordered the company to pay $200 to the Grievor.

The second case, *Jacobs Industrial and IBEW, Local 353 (Degg), Re* (264 L.A.C. (4th)) was another blanket application of a drugs and alcohol policy to employees at work that failed to appreciate the context.

This case involved an employee who accidentally backed his truck into another vehicle and damaged the bumper in the course of his work. The employee then drove from the scene of the accident to notify his supervisor about the accident. His supervisor requested that the employee take a breathalyzer test and provide a urine sample. The employee, who mistakenly believed that his employer could not require him to take a drug test in any circumstances, refused to comply. As a result he was suspended from work until he was willing to undergo treatment and testing for alcohol abuse.

The employer's drug and alcohol policy stipulated that post-incident testing may occur when there are reasons to believe that drugs or alcohol may have caused the incident. The policy gave supervisors the ability to waive the drugs and alcohol testing.

Arbitrator Albertyn determined the grievance in the Union's favour. He based his decision on the fact that there was no history of the grievor abusing drugs or alcohol and the grievor did not show any physical signs of impairment at the time of the accident. The arbitrator determined that in these circumstances drug and alcohol testing was not justified.

The moral of these two cases is that an employer cannot demand that any employee involved in an accident should submit to drug and alcohol testing, regardless of the circumstances. There has to be a legitimate reason for the employer to believe the employee was impaired or that a test is necessary as part of a post-accident investigation. However, it is prudent for unions to advise their members to generally follow the "obey now, grieve later" rule when asked to submit to a drug and alcohol test because they could be disciplined for refusing a justified request.

D. FRAUD IN EMPLOYEE BENEFIT PLANS

Robert M. Church

It is not uncommon for benefit plans, in addition to providing support for some of your most vulnerable members, to also suffer from inappropriate activity in terms of misuse, abuse, over-utilization, over-billing, inappropriate billing and fraud. In these circumstances, providers, plan sponsors, plan advisors and plan members can be

responsible for this activity. This type of malfeasance engages the duties of plan administrators and can have severe consequences for a plan member's employment.

Responsibilities of Plan Administration

The plan administrator should have in place "book marks" to attempt to discover when this activity is occurring or about to occur. Random audits, monitoring of claims and education of both plan employees and members can help detect and prevent abuse of a benefit plan.

When abuse is suspected, there should be an immediate investigation process to determine the source of the abuse and the entities/persons involved in the abuse. Ideally this investigation should follow a process already developed prior to any specific instance of fraud. For that purpose, most insurance companies do have fraud prevention/detection departments.

As an aside, in the age of Facebook and social media, it must be presumed that insurance companies will routinely monitor information (photos, postings, etc.) that members make publicly available on the Internet. There is no reasonable expectation of privacy for information that members willingly make public, and this information can be used by the insurance company or employer to prove fraud.

If an investigation discloses the existence of benefits abuse or fraud, there should be a demand for repayment, referral to law enforcement and ultimately a civil remedy to recover the loss, damages and costs. There is a fiduciary duty on the plan administrator to the other members of the benefit plan to seek recovery of any loss.

Discipline for Fraud

Fraudulent benefit claims can also have employment consequences. Arbitrators consider benefits fraud an offence that can sustain a discharge. For example, in *City of Brampton and CUPE Local 831*, 2015 CanLII 93987, a termination was upheld by Arbitrator Surdykowski for an employee who submitted false claims in the names of his dependents.

The facts of this case should be a lesson for all employees who may be tempted to take advantage of a benefit plan.

The employee in question had 26 years of service and was 45 years old. He had worked his entire adult life at the City of Brampton. The employee submitted two claims for orthotics on behalf of his daughters, both of whom were students who lived with their mother. Manulife attempted to verify the claims and was advised that the provider had no record of the claims and that the children were not patients of the provider. During the investigation by Manulife, the grievor cancelled the claims.

The employer was advised by Manulife of the attempt by the grievor to submit fraudulent benefit claims. The employer proceeded to interview the grievor, who essentially denied any knowledge of the claims. This denial ended up harming the grievor's chance of success at arbitration.

At the arbitration hearing, the grievor came clean and threw himself at the mercy of the arbitrator. Arbitrator Surdykowski, in upholding the discharge, stated:

> " ..discharge may be an appropriate disciplinary response to the first serious breach of trust and I would add that it is appropriate to give greater deference to an employer's disciplinary response to a serious breach of trust misconduct than in cases concerning other forms of employment misconduct."
>
> - and -
>
> "... in the absence of extraordinary mitigation circumstances it is not appropriate for an arbitrator to interfere with an employer's properly considered decision to terminate employment for benefits fraud."

In this case, the fact that the grievor was a long-service employee with a clean record was "not sufficient to mitigate serious intentional employment related fraud or attempted fraud." Further, the failure to successfully complete the fraud, the financial loss to the grievor, and the personal circumstances of the grievor did not outweigh the attempted fraud and the grievor's lack of remorse.

In conclusion, benefits fraud can potentially impair the effectiveness benefit plan for all plan members and also cause havoc on the individual employee who commits the fraud.

E. WORKPLACE HARASSMENT – RECENT OHSA DEVELOPMENTS

Robert Whillans

Ontario employers' legal obligations with respect to workplace harassment have become more stringent as a result of amendments to the *Occupational Health and Safety Act* ("*OHSA*") which came into force on September 8, 2016. Unions should ensure the employers for whom they hold bargaining rights take immediate steps to ensure their practices comply with these changes to the *OHSA*. Unions should also advise their members of their employers' new obligations to make sure employers are complying at the ground level.

Background to the *OHSA* and Workplace Harassment

The *OHSA* requires employers to prepare and review a policy on workplace harassment at least annually, regardless of the size of the workplace or the number of workers. Similarly, all employers must develop and maintain a program to implement the workplace harassment policy.

Further, the *OHSA* requires all employers to investigate incidents of workplace harassment, regardless of whether or not there has been a complaint filed.

Workers have several rights under the *OHSA* where they are affected by workplace harassment. They should generally first use the processes established in their workplaces' harassment program. They may also grieve workplace harassment if they feel their concerns are insufficiently addressed by their employers' response. Alternatively, they may file an application to the Human Rights Tribunal of Ontario directly if the alleged harassment is based on one of the grounds prohibited under the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19.

While workers have the right to refuse work if they have reason to believe they may be endangered by workplace violence, they cannot refuse to work on the grounds of workplace harassment.

Recent Amendments to the *OHSA*

It is now necessary for an employer to perform an annual review of its workplace harassment program in consultation with the workplace's Joint Health and Safety Committee ("JHSC"). Consultation requires employers to provide the JHSC with the opportunity to comment, and not simply to inform the JHSC of decisions the employer has made unilaterally.

A workplace harassment program must now provide means for workers to report harassment to someone other than their employer or supervisor if the employer or supervisor is the alleged harasser.

The program must also establish clear rules regarding disclosure of information gathered during an investigation, including rights of access for both the complainant and the alleged harasser.

Finally, the *OHSA* now includes a requirement that a workplace harassment investigation be "appropriate in the circumstances", and empowers Ministry of Labour inspectors to order employers to engage a third party investigator, at the employer's expense.

The Code of Practice

In order to assist employers in their revision of their practices, the Ministry of Labour has issued a Code of Practice regarding workplace harassment. The Code of Practice is not itself legally binding. Employers do not need to comply with its recommendations. However, if an employer does decide to comply with the Code's recommendations, the employer is deemed to be compliance with the *Act's* legal requirements.

As such, it is arguable that an assessment of whether the steps taken by an employer in its harassment investigation are "reasonable" should include consideration of the recommendations of the Code of Practice.

The Code of Practice makes the following recommendations, among others:

- Employers should ensure that workers can report to someone who is not under the direct control of the alleged harasser.
- The workplace harassment program should include information regarding the employer's record-keeping practices for harassment investigations that have concluded.
- An investigation should be completed within 90 days unless there are extenuating circumstances.
- The individual investigating the complaint must not be the alleged harasser or under the direct control of the alleged harasser.
- The investigator should interview both the worker and the alleged harasser, even if the alleged harasser is not a worker.
- The investigator should make reasonable efforts to interview any relevant witnesses, including witnesses who are not themselves workers.
- The investigation should conclude with a written report that sets out findings of facts and comes to a conclusion as to whether harassment occurred. The results of the investigation, although not necessarily the report, should be shared with the complainant and the alleged harasser within 10 days of the conclusion of the investigation.

F. LOSS OF COMPANY CELL PHONE WHILE ON VACATION – NOT GROUNDS FOR DISCIPLINE

Melissa Kronick

In a recent decision between *Unifor and Bell Technical Solutions* dated July 23, 2016, Arbitrator Mitchnick found that the loss or theft of a work cell phone while an employee is on vacation is not grounds for discipline.

The company policy encouraged personal use of the company cell phone subject to inappropriate behavior. The company also required workers to have their cell phones on them even when off duty so they could receive communications from the company on matters such as as overtime opportunities.

The Grievor was on vacation and at a Blue Jays Game with his company cell phone. After going through security, he noticed his company cell phone was gone. He reported the loss/theft of the phone to the company as soon as he was able in accordance with company policy.

Before the Grievor returned from his vacation, and before speaking to the Grievor to see if there was any further explanation for the lost phone, the acting manager made the decision to issue the Grievor a five-day suspension. In addition, the grievor offered to reimburse the company for the phone but the company rejected the offer.

While acknowledging that carelessness with company assets may be grounds for discipline, in this case, Arbitrator Mitchnick agreed with the Union that in these circumstances the Grievor's actions were not deserving of discipline. He ordered the company to pay the Grievor for the five days and remove the suspension from the Grievor's record.

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