2020 Year in Review:

Atlantic Canada Labour & Employment Law Developments

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LAWYERS • AVOCATS

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NEW BRUNSWICK

Kathleen Nash

Legislative changes

1. New emergency leave introduced in response to COVID-19

In response to COVID-19, a new job-protected unpaid leave was introduced for workers who are affected by a state of emergency or other similar emergency situations, such as COVID-19. The *Employment Standards Act* was amended to include the emergency leave provisions and a new regulation was introduced, outlining the circumstances for which an emergency leave must be granted by employers.

Employees are entitled to unpaid leave if they are under medical investigation, supervision or treatment related to COVID-19, are required to quarantine or isolate, or are providing care or support to an individual with whom the employee shares a close family relationship because of a matter related to COVID-19, including school or early learning and childcare facility closures. The employee is entitled to leave until the earlier of the date on which the purpose of the leave no longer exists, the date on which the Regulation is repealed, or a date on which the employer and employee agree.

2. Employers must implement work plans related to COVID-19

The Government of New Brunswick first declared a State of Emergency on March 19, 2020 and has, as of January 5, 2021, maintained the State of Emergency in response to COVID-19. The most recent Mandatory Order outlining the measures implemented by the Government in response to the State of Emergency can be found here.

Beginning in May 2020, the Mandatory Orders have required every business proprietor, service provider, employer and workplace manager to minimize the risk of COVID-19 transmission among their employees, patrons and visitors, and comply with all directives and guidelines from both WorkSafe New Brunswick and the Chief Medical Officer of Health. Employers and workplace managers must create and implement an operational plan that addresses how the employer and/or manager will minimize the risk of COVID-19 transmission.

WorkSafe New Brunswick's guidelines, draft operations plan, and FAQ can be accessed here. The New Brunswick Public Health website, which includes a link to an "Operational Plan Guide" and example posters to be displayed in businesses can be accessed here.

For a detailed review of this legislative change, please see our thought leadership piece here.

3. New administrative penalties under the *Occupational Health and Safety Act*

The *Occupational Health and Safety Act* ("*OHSA*") was amended, effective July 8, 2020, to introduce new sections – sections 36.1 through 36.6 – which provide for administrative penalties

which may be imposed by an officer who makes an order in writing under section 31 (general orders) or section 32 (unsafe or unhealthy working conditions) of the *OHSA*.

The administrative penalties are an alternative order against a person who has contravened the *OHSA* – a person may now be charged with an offence or be subject to an administrative penalty for a contravention of the *OHSA,* but not both. The administrative penalties differ for those payable by an employer, contracting employer, contractor, subcontractor or supplier (up to $500 for a first contravention, up to $1,000 for a second, and up to $2,000 for subsequent contraventions), or those payable by a supervisor or owner (up to $250 for a first contravention, up to $500 for a second, and up to $1,000 for subsequent contraventions), or those payable by an employee (up to $100 for a first contravention, up to $200 for a second, and up to $500 for subsequent contraventions). Contraventions are deemed to be a first contravention if a period of three years has elapsed since the person was issued a notice of administrative penalty for a previous contravention.

Notice of an administrative penalty must be issued not more than one year after the officer first had knowledge of the contravention and served on the person to whom it is directed within 14 days of its issuance. The penalty must be paid within 30 days of it being served or appealed to the Chief Compliance Officer within 14 days of it being served.

Case law updates

1. Informing clients of a business closure prior to employees does not justify punitive damages (*Total Credit Recovery Ltd v Martin et al*, 2020 NBCA 8)

On February 6, 2020, the New Brunswick Court of Appeal overturned a motion judge's decision to award punitive damages to four employees, of varying lengths of service, who had been dismissed from their employment with Total Credit Recovery (Atlantic) Limited. Each employee was provided only two or four weeks' pay in lieu of notice. On a motion for summary judgment, the motion judge awarded the employees damages equivalent to a reasonable period of notice. The motion judge further held that the employees were entitled to recover punitive damages based on the employer's bad faith conduct in the dismissals and extended the notice period of each employee by four months.

The Court of Appeal overturned the motion judge's decision to award punitive damages but upheld his award of damages for reasonable notice. The Court of Appeal found that the employer's conduct was not so outrageous as to justify punitive damages. The motion judge had focused on the employer's decision to notify its clients of its closure prior to its long-time employees in finding bad faith conduct. The Court of Appeal disagreed and held that this was a business decision and was not reprehensible conduct that could justify an award of punitive damages. The Court of Appeal held that the employees had been fully compensated by the award of damages in lieu of notice.

2. The duty to accommodate overrides an employee's acceptance of a new position (*USW, Local 1-306 and Agropur (White), Re*, 2020 CanLII 10096 (NB Arb) (Couturier, February 10, 2020))

The grievor had been employed as a Quality Control Technician ("QCT"), working alternating shifts at the employer's facility. Due to his disability, the grievor's physician provided a note indicating the grievor was required to work only day shifts. After four days of discussions between the employer, the union and the grievor, the employer concluded the only available position for the grievor was a janitorial position. The grievor accepted this position by signing the employer's offer. The Union grieved, arguing that the transfer breached the employer's duty to accommodate and its obligation to maintain the QCT rate of pay under the Collective Agreement.

Arbitrator Couturier held that the employer's duty to accommodate the grievor overrode the grievor's acceptance of the new position. Therefore, even if an employee accepts, by way of a written offer, a new position with an employer, the employer must still demonstrate that it met its duty to accommodate the employee. In this case, Arbitrator Couturier found that the employer had failed its duty to accommodate the grievor as it was inflexible, provided only one alternative position, and did not seriously consider other options, at a time when the grievor was under financial distress. The employer was ordered to pay the grievor the sum of the difference in pay from his position as QCT and his position as janitor for all hours worked by him as a janitor and to reassess how the grievor could be accommodated.

3. Worker's direct evidence is not "anecdotal" (*Best v Workplace Health, Safety and Compensation Commission and Anglophone South School District*, 2020 NBCA 40)

The Court of Appeal overturned the Workplace Health, Safety and Compensation Commission's denial of the appellant's request for coverage of medical marijuana. The appellant had a workplace accident in 2002 which caused her chronic pain. After failed attempts with other medication, the appellant began taking medical marijuana in 2011 and requested coverage from the Commission in 2017. The Commission denied her coverage, stating that its medical advisor had indicated that medical marijuana was not a requirement in relation to her compensable injury. The Workers' Compensation Appeals Tribunal upheld the Commission's denial, finding that the appellant's own "anecdotal evidence" that the medical marijuana was beneficial was insufficient to prove it was necessary for her compensable injury.

The Court of Appeal held the Appeals Tribunal erred in considering the appellant's evidence to be "anecdotal", rather than direct evidence, and that it failed to consider the case on its merits. Further, the Appeals Tribunal had referenced its earlier decisions to fund medical marijuana on the basis of the evidence of the injured workers in its decision but failed to explain why it chose to treat the appellant differently.

The Court of Appeal further determined that the record on appeal contained sufficient evidence to allow it to determine the appellant's use of medical marijuana was necessary in the circumstances, given that she had tried numerous other medications and pain management

treatments to no avail and therefore ordered the Commission to compensate the appellant for her medically authorized marijuana for a certain period of time.

4. The end of "boomerang" motions (*Abrams v RTO Asset Management*, 2020 NBCA 57)

The process for seeking summary judgment in New Brunswick was clarified by the Court of Appeal in *Abrams*. The plaintiff had filed a motion for summary judgment; the respondent, on the other hand, had not filed its own summary judgment motion but, rather, had simply relied on the appellant's summary judgment motion to request relief. The motion judge had dismissed the appellant's motion for summary judgment and granted judgment in favour of the respondent.

The Court of Appeal clarified that the wording of Rule 22 does not support the use of such "boomerang" motions and held that such relief was not an adjudicative option. The Court of Appeal held that "*A motion, formal or informal, is a condition precedent to a summary judgment under Rule 22*" and that an order dispensing with this requirement should only be allowed in exceptional circumstances. Therefore, summary judgment in the respondent's favour was procedurally unassailable in this case.

The Court of Appeal also addressed some key aspects of wrongful dismissal actions, including when a termination may be deemed to be without cause, the enforceability of termination clauses, and the calculation of length of service:

- *With or without cause?* Despite RTO's arguments that it terminated Abrams on a with cause basis, the Court of Appeal held that Abrams was dismissed on a without cause basis in part because the termination letter, which was the only document relied on to meet the requirement of written notice under section 30(2) of the *Employment Standards Act*, indicated that the termination was without cause.

- *Termination clauses.* The Court of Appeal further contemplated the termination clause in Abrams' employment contract and held that it was void as it purported to contract out of certain benefits under the *Employment Standards Act*, namely vacation pay and accrued wages on termination. The clause provided that employment could be terminated on written notice and that once notice or pay in lieu was provided, the employer "*shall not be obliged to make any further payments*." The Court of Appeal confirmed that this rendered the entire clause void and, therefore, the presumption of reasonable notice stood unrebutted.

- *Length of service.* In calculating the length of reasonable notice for Abrams, the Court of Appeal held that Abrams' years of service was not 'broken' by a relatively brief medical leave. Further, although the employment agreement signed after his return from his medical leave purported to deprive him of the benefit of his previous years of service, the contract was no longer operative at the time of termination as he had signed a more

recent employment agreement, which superseded all previous agreements, and which did not contain a similar clause.

For a detailed review of this decision, please see our thought leadership piece here.

In November 2020, RTO filed an application for leave to appeal to the Supreme Court of Canada. We will provide an update to our previous thought leadership piece once a decision has been made with respect to the application for leave to appeal.

5. Clarification of assessment of workers' compensation claims based on mental stress (*New Brunswick Liquor Corporation v Sauvageau et al*, 2020 NBCA 61)

The respondent employee had applied and was granted workers' compensation benefits after she was diagnosed with post-traumatic stress disorder. The event purporting to trigger the diagnosis occurred shortly after the employee had returned to work from stress leave. The employee discovered that her shoes had been moved and accused the assistant manager of moving them. The assistant manager denied moving the shoes but the employee later discovered she and another employee had moved her shoes, allegedly causing an acute stress reaction. The employer appealed the granting of benefits.

The Court of Appeal granted the appeal, finding the Workers' Compensation Appeals Tribunal's decision was not reasonable in the circumstances. The Court of Appeal held that the analytical framework for assessing mental stress claims under the *Workers' Compensation Act* begins with the principle that claims for disablement of mental stress are presumptively not compensable; however, this presumption is rebutted when it is shown that the disablement results from an acute reaction to a traumatic event. The traumatic event must arise out of and in the course of employment and the event cause an acute reaction disabling the worker from being able to function at work. The traumatic event component of the exception is met when one of the following occurs:

(1) a licensed psychologist or psychiatrist diagnoses a worker with PTSD using the diagnostic criteria of the latest DSM **and** the diagnosis is accepted by the Commission or Appeals Tribunal; or

(2) where there is no diagnosis or the diagnosis is not accepted, the precipitous event is one that the reasonable person would regard as traumatic.

In this particular case, the Court of Appeal held that the diagnosis of PTSD could not have been made in accordance with the DSM criteria because the first component –a traumatic event – was not met. As the diagnosis should not have been accepted, the Court of Appeal held that the appropriate test is whether a reasonable person, possessing the same psychological profile, would have reacted in the same way as the claimant. The Court of Appeal held that the Appeals Tribunal erred as it had applied a modified objective test. The Court of Appeal held that it was

unreasonable for the Appeals Tribunal to conclude that a traumatic event occurred and that the appellant had suffered an acute reaction and therefore allowed the appeal.

6. Arbitrations can be conducted via Zoom (*Kennebecasis Firefighters Union, IAFF Local 3591 and Kennebecasis Regional Fire Department, Re*, 2020 CanLII 46148 (NB Arb, July 16, 2020))

A New Brunswick Arbitration Board concluded that the arbitration of this matter could be conducted virtually using Zoom, despite the employer's objections. The Board concluded that the state of emergency in New Brunswick would create significant restrictions on the conduct of an in-person hearing and therefore a Zoom hearing was reasonable. The Board dismissed the employer's arguments that the Zoom platform was not secure, finding that the new security protocols of Zoom, including having a password and a waiting room, were sufficient to grant the necessary protection for any privacy and security concerns. The Board further noted that because the employer was a public body, the arbitration hearing could be open to the public, and therefore it would take this into consideration in determining the persons allowed to participate in the hearing. Further, the Board determined that the credibility of witnesses would not be crucial in its determination and therefore this did not operate to prevent a Zoom hearing.

7. Win for employers – union found to not have complied with duty to bargain in good faith (*Saint John Board of Police Commissioners v. Saint John Police Assn.,* (NB LEB, December 2, 2020))

The New Brunswick Labour and Employment Board recently found that the Saint John Police Association was in violation of its obligation to bargain collectively and to make every reasonable effort to conclude a collective agreement, in violation of section 34(2) of the *Industrial Relations Act*.

The legislated dispute resolution process for collective bargaining in this instance is interest arbitration, but the Minister must be satisfied that the parties have bargained in good faith before appointing an arbitration board or arbitrator.

The statutory duty to bargain collectively has both an objective and subjective element. Subjectively, both parties must be committed to bargain in good faith and this is judged based on the conduct of the parties. Objectively, the parties must "*make every reasonable effort to conclude a renewal or revision of the agreement or a new agreement*." The objective component is measured against the standard of rational and informed discussion – there is an obligation to meet with the other party and genuinely attempt to resolve the issues. The duty to bargain at least requires each party to obtain sufficient information to assess the other's proposals and must "*honestly strive to find middle ground*."

The Saint John Police Association was found not to have complied with the duty to bargain as they did not attempt to resolve the issues in dispute or consider potential middle ground during the exchange of proposals in January 2020 or when meeting with the conciliator in February 2020. There was no informed and rational discussion about the proposals of the Saint John Board of Police Commissioners; the proposals were simply rejected and a one year wage

increase was proposed. The Board held that rejecting the proposals, without gathering any additional information, did not meet the duty to bargain.

The Board concluded, based on the testimony of the Association's witness, that a mediator should be appointed as the witness indicated that if directed to resume collective bargaining, the position of the Association would not change. As a result, the Board directed the parties to meet within 14 days of the order, retain the services of a mutually agreeable mediator, and make every reasonable effort to conclude a collective agreement.

What's to come in 2021?

1. *Workers' Compensation Act*

On December 8, 2020, Bill 19, *An Act to Amend the Workers' Compensation Act* was introduced. If approved, Bill 19 would amend section 42.4(7)(b) of the English version of the *Workers' Compensation Act* to provide that if an employer re-employs a worker and then dismisses the worker, the employer is presumed not to have fulfilled the employer's obligations to re-employ injured workers if the worker is dismissed within six months after ceasing to receive compensation if, at the time of re-employment, the worker is receiving compensation.

2. *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*

On December 8, 2020, Bill 20, *An Act to Amend the Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act,* was introduced. Bill 20 has gone to the Committee but has not yet had its Third Reading. If approved, Bill 20 will amend several sections of the *WHSCC and WCAT Act*.

In particular, section 19.11 of the *WHSCC and WCAT Act* would be replaced by a new section which will allow a person directly affected by a decision, order or ruling of the Workplace Health, Safety and Compensation Commission to request a review of the decision by the Commission within 90 days after the decision is made. The person directly affected by a decision can appeal a review decision within one year after the date the Commission provides written reasons for the decision to the person who requested the review.

NOVA SCOTIA

Richard Jordan & Daniel Roth

Legislative changes

1. **Minimum wage increase in 2020, possibly again in 2021; CPI increase thereafter**

On April 1, 2020, the minimum wage in Nova Scotia increased by $1.00 per hour, $0.45 more than was originally anticipated. This brought the minimum wage to $12.55 per hour, and follows a prior increase of $0.55 on April 1, 2019. Prior to April 1, 2019, the minimum wage had been adjusted annually based on the change in the Consumer Price Index ("CPI").

Concurrently, the inexperienced minimum wage differential (which previously allowed employers to pay employees with less than three months relevant experience $0.50 less than the minimum wage for the first three months of their employment) was eliminated in favour of the above minimum wage. Further, the partial hours rule, which effectively caused employees who worked less than 30 minutes to be paid in 15 minute increments, but in hour long increments after the half hour had lapsed, has been eliminated.

2. **Increasing pay equity and changes to leaves under the Nova Scotia *Labour Standards Code***

Bills 220 and 221 passed in the Nova Scotia Legislature in March 2020, amending the Nova Scotia *Labour Standards Code*.

Bill 221 addressed the gender wage gap by amending the *Labour Standards Code* provisions regarding equal pay for equal work. Principally, Bill 221 expanded access to pay information for individuals applying for, or accepting, a new job. The amendments also prohibit employers from asking about applicants' and employees' wage history. Further, employers cannot prohibit employees from discussing or disclosing their own wages, or those of other employees.

Bill 221 also equalized some of the language used in the *Code*, updating the definition of "gender" and making corresponding changes to explicitly extend gender equity protections to people who do not identify exclusively, or at all, with the male-female gender binary. Finally, Bill 221 expands coverage of the equal pay provisions to include employees who possess certain characteristics, such as race or ethnicity, opening up the protections beyond gender.

Bill 220 made changes to reservist leave and pregnancy and parental leave. The reservist leave changes were made to realign the provincial *Code* with the federal *Canada Labour Code*, which had seen changes made in 2019. The core changes include reducing the eligibility period to access leave from one year to three months, increasing the length of the leave period from 18 months within a three year period to 24 months within a 60 month period (and allowing for

longer periods in the event of a national emergency), and reducing the notice period for employers from 90 days to 30 days (or as much notice as reasonably possible where less than four weeks' notice is given to the employee).

The pregnancy and parental leave changes reduced the start date from no sooner than 16 weeks, to no sooner than 15 weeks before the expected date of delivery (and end no sooner than one week after delivery), and created an exception to the four week notice requirement where an employee has been employed for less than four weeks.

3. New pension funding framework

On April 1, 2020, the new *Pension Benefits Regulations* establishing a new defined benefit pension funding framework came into effect. Highlights include:

- a reduction in solvency funding obligations (requiring special payments into a defined benefit plan to increase the plan's funded ratio to only 85%, where it was previously 100%);

- enhancements to going concern funding obligations (requiring an additional extra percentage margin called the "provision for adverse deviations" or PfAD, which will vary from 5-22% depending on the proportion of the plan's fixed income assets in specified investment categories). The maximum amortization period for going concern unfunded liabilities has also been reduced from 15 years to 10 years;

- permission to deposit contributions in relation to a solvency deficiency or a going concern PfAD into a separate reserve account, from which the employer may withdraw any surplus on windup of the plan, subject to the Superintendent's permission and other conditions;

- further restricting contribution holidays, prohibiting those that reduce the funded ratio below 105% on either a going concern or solvency basis; and

- no longer requiring certain solvency-exempt plans under s 19(6) of the *Pension Benefits Regulations* to file annual valuation reports when there is a solvency deficiency. Reserve accounts established for a defined benefit plan must be accounted for in the valuation report, separate from the remainder of the fund.

Other changes to the *Pension Benefits Regulations* include removing the limit (formerly 15%) on the use of letters of credit for solvency deficiency funding, and allowing administrators to discharge liability for annuity buyouts of a defined benefit plan that is now wound up. Further, individual pension plans for members who are "connected" (as defined in the *Income Tax Act*) will be exempt from certain pension provisions (including those regarding membership, vesting and standard of care). The Nova Scotia *Pension Benefits Regulations* will be harmonized with those of other jurisdictions by incorporating the rules under the federal *Pension Benefits Standards Regulations, 1985*, including any future amendments to those regulations.

See our thought leadership pieces (here and here) from our Pension and Benefits Group for a more in-depth look at Nova Scotia's new pension funding framework.

Case law updates

1. **Guidance from the Supreme Court of Canada on when bonuses are payable during the notice period (*Matthews v Ocean Nutrition Canada Ltd*, 2020 SCC 26)**

On October 9, 2020, the Supreme Court of Canada issued a decision addressing employee entitlement to bonuses in circumstances of constructive dismissal, where the event triggering the payment of the bonus occurred during the common law notice period.

Matthews, a chemist, had been employed by Ocean Nutrition Canada ("ONC") since 1997 in various senior executive positions. While in these roles, Matthews participated in a Long Term Incentive Plan ("LTIP") that would pay a significant bonus if ONC was ever sold. In 2007, ONC hired a new Chief Operating Officer, who, over the following four years, reduced Matthews' job responsibilities and lied to him about his status and future with the company. Matthews quit in 2011, finding the situation had become untenable. Thirteen months after Matthews quit, ONC was sold for $540 million – an amount which, under the LTIP, would have entitled Matthews to a bonus of approximately $1 million.

The Court found, in alignment with the trial judge, that Matthews had been constructively dismissed and was presumptively entitled to the bonus payment as part of his 15-month common law notice period. The language of the LTIP did not effectively restrict Matthews' entitlement to the bonus as part of the notice period. It was uncontested that the sale had occurred during the notice period, and the Court held that, but for Matthews' constructive dismissal, he would have been entitled to the bonus.

See our recent thought leadership piece for a more in-depth look at the Supreme Court of Canada's *Matthews* decision, including the Court's analysis on claims of bad faith in the context of wrongful dismissal.

2. **Imposition of terms of reinstatement following a last chance agreement (*UNIFOR, Local 823 v K + S Windsor Salt Ltd*, 2020 CanLII 90475 (NS Arb) (Richardson, November 23, 2020))**

A recent Nova Scotia labour arbitration decision addressed the imposition of terms of reinstatement on a union member who failed to adhere to a last chance agreement ("LCA") regarding his history of absenteeism. In a prior decision, the arbitrator found that the LCA had not accommodated the grievor's disability (i.e., alcoholism) and ordered the grievor's termination set aside. The Union and the Employer were unable to agree on conditions of reinstatement, and the matter reverted to the arbitrator for determination.

Guided by the twin principles that conditions are tools to assist and support the reinstated employee, while ensuring the employer is not subjected to undue hardship while accommodating the employee, the terms and conditions of reinstatement that emerged were:

- the grievor must abstain from alcohol and drugs, with the exception of medications;
- the grievor must submit to return-to-work substance testing, and the test must show no presence of drugs or alcohol. The grievor must then submit to any future testing as permitted under the Employer's Substance Use Policy;
- the grievor must submit to assessment by a Substance Abuse Professional, who will prepare an assessment and individualized treatment plan for the grievor;
- the grievor must attend Alcoholics Anonymous meetings at least bimonthly. The grievor must secure and maintain a sponsor, and must meet with the sponsor at least bimonthly. Written proof of the grievor's attendance at both Alcoholics Anonymous meetings and sponsor meetings must be provided to both the Employer and the Union at least bimonthly;
- the grievor must attend work at all scheduled times, including any agreed overtime, for the full duration of the scheduled shift;
- the period between termination and reinstatement would be deemed a suspension, not a medical leave, as the grievor did, in fact, breach the LCA by failing to disclose his alcohol addiction to the Employer;
- the conditions would apply for two years; and
- any breach of the conditions would be grounds for termination.

However, the arbitrator also ruled:

a) there was no appropriate basis to order random testing. The Employer's Substance Use Policy already provided for testing on reasonable cause or where there was an incident. Incorporation of that Policy would be an appropriate condition in view of accommodation, where there was no evidence to suggest the grievor had attended work while intoxicated;

b) absences greater than seven days would not extend the duration of the conditions' application, as any unauthorized or improper absences would, in and of themselves, be grounds for discipline; and

c) a zero tolerance policy would be inappropriate given the frequency of relapse in cases of addiction.

These conditions show a flexible, balanced approach to reinstatement, whereby both the employer's and grievor's interests are advanced and protected. They provide a framework around which other reinstatement agreements can be crafted, accounting for the particular circumstances of the parties.

3. **An appeal of a discriminatory action complaint under the *Occupational Health and Safety Act* automatically suspends the complaint (*Autoport Limited v Offrey-Chase*, 2020 NSLB 55 (CanLII))**

The Nova Scotia Labour Board rendered a decision on the effect of an appeal under s. 69 of the *Occupational Health and Safety Act* ("Act") on discriminatory action complaint compliance orders issued under same. The compliance order being appealed was issued in relation to complaints brought that the Employer was not taking all reasonable measures to implement social distancing in the workplace, resulting in employees refusing to work and being sent home.

The Board agreed with the Employer that an appeal of a discriminatory action complaint under s. 69 of the Act was automatically suspended under s. 69(8) of the Act. While s. 69(7) creates a presumption that an OHS order is not suspended pending appeal, the language in s 69(8) operates as a clear exception to that presumption for an appeal of a discriminatory action complaint. Accordingly, the balancing of interests test outlined in *Re Cummings and Irving Shipbuilding*, 2020 NSLB 26, which applies to other requests to suspend an OHS order under s. 69(7), does not apply under s. 69(8).

What's to come in 2021?

With the launch of Uber's ride sharing service in Halifax Regional Municipality on December 2, 2020, the Nova Scotia Courts may see some activity related to the service in 2021.

A case concerning Uber was heard at the Supreme Court of Canada in 2020, where the Supreme Court of Canada determined that Uber's mandatory arbitration clause, which purported to require a Toronto UberEats driver to arbitrate with Uber in the Netherlands (with a base cost of approximately US $14,500), was unenforceable on the basis of unconscionability. This decision has permitted that driver to proceed with his class action against Uber alleging that he and other drivers are employees of Uber, and are therefore entitled to the benefits of Ontario's *Employment Standards Act, 2000*.

PRINCE EDWARD ISLAND

Kate Jurgens & Laura Woodworth

Legislative changes

1. Emergency leave

Emergency leave is now available for workers in Prince Edward Island who are unable to work as a result of COVID-19. Bill 38, *An Act to Amend the Employment Standards Act (No.3)* ("Act") received Royal Assent on June 18, 2020. Under this amendment, during an emergency as defined under the Act, an employee is entitled to an unpaid emergency leave of absence for the duration of the time in which the employee is unable to perform the duties of their position as a direct result of the emergency. Emergency leave will apply only as part of a provincially-declared emergency. Personal emergency will not constitute an emergency under this Act.

Emergency leave will continue for the duration of the emergency so long as it continues to prevent employees from performing their work duties. In the event employees are able to perform their work duties as a result of a change in circumstances (e.g., their period of self-isolation is over or they have found child care), they are not able to continue with this unpaid leave of absence.

In determining whether emergency leave is available in the context of childcare, an employee should ask (1) whether childcare is unavailable as a result of public health directives, and (2) if so, whether the employee is the only person reasonably able to provide the childcare needed.

Details on when employees are eligible to take emergency leave, as well as employers' obligations regarding job security were discussed further in our thought leadership piece, Prince Edward Island Labour and Employment Legislation Changes.

2. Whistleblower protection

An *Act to Amend the Employment Standards Act (No.4)* received Royal Assent July 14, 2020. These amendments prohibit an employer from taking any reprisal or discriminating action against an employee, or threatening to do so, for reporting an offence to a lawful authority or testifying in an investigation or proceeding pursuant to a provincial or federal Act, except where the actions of the employee are frivolous or vexatious.

Whistleblower protection is essential in promoting a culture of accountability and integrity in the workplace. Employees are typically the first to recognize wrongdoing in the workplace and by allowing whistleblowers to speak up without fear of reprisal this legislation can help authorities both detect and deter violations while affording those bringing the complaints forward with some measure of job security.

More information on whistleblower protections can be found in our thought leadership piece, Prince Edward Island Labour and Employment Legislation Changes.

3. Workplace harassment regulations now in effect

New workplace harassment regulations came into effect on July 1, 2020. These regulations are made pursuant to section 46 of the *Occupational Health and Safety Act*, and outline an employer's responsibilities to prevent and investigate harassment in their workplace.

These regulations impose a duty on employers to develop and implement a written workplace harassment policy which includes a clear definition of workplace harassment, a statement that every worker is entitled to work free of harassment and information on how to make a harassment complaint. Notably, the regulations also place a duty on employers to intervene if they know or ought reasonably to know that harassment is occurring in their workplace.

That means that employers are obligated to step in to stop harassment when they see it happening, identify the source of the harassment and take steps to prevent future incidents of harassment. Employers should also be aware that they may be responsible for costs associated with investigating harassment claims, under s 7(2) of the Regulations.

Both single and repeated occurrences of inappropriate conduct can constitute harassment. Where employers fail to take corrective action, Occupational Health and Safety Officers have the authority to order the employer to take further action to remedy the harassment.

Case law updates

There is no case law to report.

What's to come in 2021?

1. First contract arbitration

An Act to Amend the Labour Act ("Act") received Royal Assent on December 4, 2020 and is anticipated to come into force early in the New Year.

This Act will introduce first contract arbitration. First contract arbitration allows the parties in an unsuccessful negotiation to apply to the Labour Board to direct the settlement of a first collective agreement. In the event that a dispute relating to concluding a first collective agreement has not been resolved, parties to the dispute can apply for assistance in settling the terms and conditions of the first collective agreement.

The impact of these changes was discussed further in our thought leadership piece, Prince Edward Island Labour and Employment Legislation Changes.

NEWFOUNDLAND AND LABRADOR

David Constantine, Sarah Byrne, Tyler Callahan & Sarah Pinsent

Legislative updates

1. COVID-19 related changes

There were many temporary regulatory and policy changes that passed in 2020. A few remain relevant. Multiple deadlines affecting human rights, labour relations, and court proceedings were extended into the fall of 2020. The after-effects of these delays will be felt well into 2021. The 13-week temporary layoff period in the *Labour Standards Act* was extended to 26 weeks, preventing the 'deemed termination' of thousands of workers.

An unpaid '*communicable disease emergency leave*' was introduced and remains available to workers. It entitles workers to a temporary leave of absence for many things relating to COVID-19, including (a) having an actual or suspected case of COVID-19, (b) being in quarantine or self-isolation, (c) being outside of the province, (d) caring for a close family member (including children during school and daycare closures), and (e) otherwise following public health orders.

2. Minimum wage increases

After the January 17, 2020 release of the Independent Minimum Wage Review Committee's report and recommendations, the provincial government announced four increases to the minimum wage rate between April 2020 and October 2021:

- April 1, 2020 – $11.65 (increase from $11.40)
- October 1, 2020 – $12.15
- April 1, 2021 – $12.40 + Adjustment to the National Consumer Price Index (by %)
- October 1, 2021 – $12.65 (+ April adjustment)

3. Workplace violence and harassment prevention requirements

As of January 1, 2020, changes to the *Occupational Health and Safety Regulations* added to employers' occupational health and safety ("OH&S") duties an obligation to take measures to prevent harassment and violence, including potential family violence, in the workplace. Employers are required to conduct risk assessments, have in place written harassment prevention plans, and provide harassment prevention training. OH&S officers are now conducting investigations into harassment, just like any other OH&S infraction.

4. **New Human Rights Commission procedures**

The Human Rights Commission made some significant changes to its Rules of Procedure. The changes give much more power to adjudicators and aim to promote the settlement of complaints via informal hearings where adversarial and evidentiary procedures are minimized. Informal hearings may be held in person, by phone, or by video; cross-examination of witnesses is not permitted. Decisions from informal hearings will be published and enforceable, just as a ruling from a formal hearing or a court order is.

Case law update

1. **Individualized testing requirements for users of medical marijuana to test impairment (*International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.*, 2020 NLCA 20)**

The Newfoundland and Labrador Court of Appeal overturned an arbitration decision and subsequent judicial review which had previously found that the inability to determine an individual's level of impairment caused by the use of medical marijuana constituted undue hardship in the process of attempting to accommodate an individual's disability.

The Court of Appeal's decision articulated the need for individualized testing and analysis of potential impairment of an individual who uses prescription medication, including medical marijuana, with known side effects that could lead to cognitive impairments. Justice Butler, in her concurring opinion, stated that where an employer raises the need for safety in the workplace, they must show that "*this* grievor … perform[ing] *this* job on *this* site would not enable the employer to maintain reasonable site safety".

Despite the court acknowledging a lack of testing and proven science to test impairment from the effects of medication, including medical marijuana, employers were, in essence, tasked with finding an way to test impairment on an individual basis before arguing that employees posed safety risks and could not be accommodated short of undue hardship.

2. **Post-*Vavilov* decision puts onus on arbitrators to grapple with unique labour relations environments (*NARL Refining Limited Partnership v United Assn of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada,* 2020 NLSC 100)**

NARL Refining, Pipefitters, and Steelworkers have a history of jurisdictional grievances resulting from confusing and contradictory certifications. The parties had largely found a practical solution to deal with the ongoing confusion by preparing a Letter of Understanding ("LOU"), delineating each union's respective scope of work. However, after a number of years, yet another jurisdictional grievance arose. The arbitrator's decision addressing the jurisdictional issues failed to account for the LOU, and the decision was ultimately based on the strict wording of the collective agreements.

Upon judicial review, Justice McGrath determined that, among other "fundamental flaws" identified in the arbitrator's decision, the arbitrator had failed to consider the effect of the LOU, on the basis that it was not, in the strictest sense, a collective agreement. Justice McGrath found that the arbitrator had failed to link his "ultimate decision" to the unique labour relations context in which the employer and unions operated. She determined that while those considerations may have been in the mind of the arbitrator, they were not identified in the arbitrator's reasons, and the Supreme Court of Canada's decision in *Vavilov* precluded the court from inferring a chain of analysis of which there was simply no trace in the arbitrator's reasons.

3. **Faculty Association estopped from bargaining via the grievance process (*Memorial University of Newfoundland v Memorial University of Newfoundland Faculty Association*, 2020 CanLII 45582 (NL Arb) (July 6, 2020))**

This case centred on term teaching contracts. Memorial University of Newfoundland's Faculty Association ("MUNFA") argued that 15-week contracts for term appointments were unfair because of the amount of prep work required outside of the 13-week teaching period. In doing so, MUNFA alleged that the university was acting in violation of the management rights clause of their collective agreement by failing to act in a manner which was fair, equitable, and reasonable. The university denied any unfairness and argued that MUNFA was in any event estopped from grieving the matter for two reasons. First, hundreds of term appointments had been made in the decade prior and MUNFA had never once grieved the length of the contracts. Second, the length of term appointment contracts were subject to collective bargaining in at least two prior rounds of bargaining in which a collective agreement was successfully ratified.

The Arbitration Board ultimately held that the longstanding practice of 15-week contracts combined with MUNFA's failure to achieve an extension at the bargaining table estopped MUNFA from pursuing the matter further via the grievance process. Put simply, what you bargain is what you bargain.

4. **Insurance sales agents are not 'workers' under NL workers' compensation regime (*Re American Life Insurance Company* (2020), WHSCRD Case No. 18035-02, Decision Number 2020159 (December 2, 2020))**

The Workplace Health, Safety & Compensation Review Division held that insurance sales agents under contract with the American Income Life Insurance Company are independent operators rather than 'workers' under the *Workplace Health, Safety and Compensation Act* ("Act").

Review Commissioner Suzanne Hollett overturned an internal review and WorkplaceNL decisions which held that the Applicant's agents fell under the workers' compensation regime. The Review Commissioner held that the internal review did not properly characterize the relationship between the Applicant and its agents, incorrectly weighed certain factors and failed to provide a proper evidentiary basis for others, contrary to the Act and WorkplaceNL policy.

She determined that the insurance sales agents did not enter into a 'contract *of* service' and failed to meet the definition of a 'worker' in section 2 of the Act.

The Review Commissioner's decision underlines that, while parties may enter into a contract which expressly states that an agent is not an employee, an assessment of the actual nature of the relationship is required to determine whether an individual is a 'worker' under the Act. To assess the relationship, the Review Commissioner applied four tests, also utilized by the internal review specialist, to review the relationship of the parties in light of the overall intention of the Act. The recent NL Court of Appeal case of *College of the North Atlantic v McBreairty*, 2020 NLCA 19 was included to confirm that the common law tests utilized to characterize the relationship in question should be viewed together, with no factor being seen as more important, or having more weight, than the other.

What's to come in 2021?

1. Ongoing ATIPPA Review

There is an ongoing statutory review of the *Access to Information and Protection of Privacy Act, 2015*. Privacy Commissioner Michael Harvey has requested an expansion of powers, including the ability to review solicitor-client privileged documents. Submissions from over thirty public and private bodies have been received and a report and recommendations are expected by the end of March 2021.

IN CASE YOU MISSED IT

- *Accessible Canada Act* – the beginning of a new era in accessibility? (January 2020)
- Supreme Court of Canada's Canada Post decision delivers good news for federal employers (January 2020)
- Atlantic Canada Year in Review 2019 – Top 15 Takeaways for Employers (January 2020)
- Surprise changes to Nova Scotia's minimum wage and partial hours rules announced (January 2020)
- COVID-19: Keep calm and consider the issues! (March 2020)
- Government of Canada announces changes to Employment Insurance and Work-Share Program as part of $1 billion COVID-19 fund (March 2020)
- Nova Scotia announces mandatory quarantine for public sector staff and students returning from outside Canada (March 2020)
- Government of Newfoundland and Labrador creates protected leave of absence amidst COVID-19 (March 2020)
- Sportsmanship in dispute resolution: A recent decision of the Nova Scotia Supreme Court offers lessons that go beyond volunteer sport organizations (April 2020)
- Important updates announced to Canada Emergency Wage Subsidy program (April 2020)
- Government passes COVID-19 Emergency Response Act, No. 2 (April 2020)
- Think: Roadmap to recovery (April 2020)
- Did the Government of New Brunswick pave the way for employees to refuse to work during the State of Emergency? (April 2020)
- Think: roadmap to recovery – Saskatchewan's re-open plan is worthy of consideration (April 2020)
- More return to work (May 2020)

- Returning to work: COVID-19 and mental health considerations (May 2020)
- think: forward in times of crisis (May 2020)
- New Brunswick employers returning to the new normal – what's your plan? (May 2020)
- "Won't somebody please think of the children?": Family status accommodation for employers during COVID-19 (May 2020)
- COVID-19 FAQ & Checklist (May 2020)
- Nova Scotia announces plan to re-open economy, new funding (May 2020)
- Taking stock: Quick reference guide for government initiatives (June 2020)
- Temporary lay off timeline extended to 26 weeks from 13… temporarily (June 2020)
- The Supreme Court of Canada paves the way for class action lawsuit against Uber (June 2020)
- You're more essential than you think: it is crunch time for Newfoundland and Labrador employers to avail of Essential Worker Support Program (July 2020)
- Prince Edward Island Labour and Employment legislative changes (July 2020)
- Newfoundland and Labrador mandates masks in workplaces (August 2020)
- The boomerang that won't come back – Court of Appeal confirms that parties must each bring their own motions for summary judgment (September 2020)
- The million dollar question: is an employee entitled to a post-termination bonus payment? (October 2020)
- Federal work place harassment and violence prevention regulations (October 2020)
- COVID-19: Federal government announces continuing package of pandemic supports (October 2020)
- Federal *Pay Equity Regulations* published in draft – key takeaways (November 2020)
- Federal *Work Place Harassment and Violence Prevention Regulations* – a Guideline (December 2020)

- Increasing pay transparency for federally regulated employers under *Employment Equity Regulations* (December 2020)

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