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SHE'S LOVIN' IT! POOR USE OF PERFORMANCE PLAN LEADS TO WRONGFUL DISMISSAL

— Dave J. G. McKechnie, McMillan LLP. © McMillan LLP. Reproduced with permission.

The recent Ontario Superior Court of Justice decision in *Brake v. PJ-M2R Restaurant Inc.* (2016 ONSC 1795) provides a useful reminder to employers of how not to use performance improvement plans ("PIPs"). It also demonstrates the challenges employers face in dismissing long-service employees for cause due to poor performance.

Background Facts

Esther Brake was a 20 year employee of PJ-M2R Restaurant Inc., a McDonald's franchisee. Brake managed the employer's McDonald's franchise in Kanata, Ontario from 2004 to 2011, receiving very strong performance evaluations until 2011.

After receiving her first negative performance review in November 2011, Brake was transferred to another of the employer's franchises, a small, chronically underperforming McDonald's restaurant located in a Wal-Mart. Three months after Brake began managing the Wal-Mart location, she was put on a PIP.

Ultimately, the employer told Brake that she failed the PIP and had to "take a demotion or go." Brake refused the demotion and was dismissed for cause in August, three months after being placed on the PIP.

No Cause for Dismissal

In its review of the facts, the Court did not provide any detail on what the performance issues were and only stated that "there was some evidence that [Brake] ran into some difficulty in 2011 and 2012". However, the Court concluded that the employer "set [Brake] up to fail" by imposing the PIP. The Court found that the employer's measurement of Brake's performance was arbitrary and unfair, noting that her goals under the PIP were objectively more difficult than the standards by which her performance had been judged in the past.

The Court therefore found that there was no cause for her dismissal given her history of strong performance and the fact that despite being set up to fail, her performance at the Wal-Mart location was actually trending upward. Given Brake's approximately 20 years of service and age (62), the Court awarded her 20 months' notice, totalling $104,499.33 in damages.

What This Means for Employers

The employer in this case ran afoul of some fundamental principles when trying to use PIPs to improve an employee's performance:

- vague, arbitrary and unreasonable standards: an employer cannot expect an employee to become the best employee in the company, so clear, reasonable and objective standards should be used in determining the goals of the PIP.
- failure to follow up: an employer should not impose a PIP and then walk away; regular meetings should be held to discuss where the employee is in relation to the objectives of the PIP.
- lack of time: courts will typically not endorse a three-month PIP for a 20 year employee, so consideration should be given as to how long it might take for the employee to meet continued acceptable performance.

The other fundamental issue that the employer had to overcome was a demonstrated record of strong performance. Courts are likely to question an employer's motives when it suddenly concludes that an employee's performance is unacceptable when previous performance reviews indicate strong performance. Moving too quickly to a PIP can be questioned by a court or tribunal when there may have been other ways to handle the performance issues before taking that step (e.g. engaging in informal coaching and counselling meetings, outside training being provided, etc.).

PIPs can be used effectively by an employer to improve an employee's performance and that should remain the primary objective of a PIP. If an employee responds poorly to the PIP, either by demonstrating an insubordinate or belligerent attitude, or by refusing to take steps to improve performance, the PIP becomes connected with a course of discipline that can lead to a cause termination. However, the PIP must be implemented and managed carefully if it is going to achieve the goal of improved performance or to show that the employee's reaction to the PIP provided cause for dismissal.

If you have any questions about this case or about how to effectively use PIPs, please contact any member of the McMillan LLP Employment and Labour Relations group.

UNIONS HAVE NO AUTOMATIC RIGHT TO PARTICIPATE IN THE ACCOMMODATION PROCESS OF UNION MEMBERS

— Graeme M. McFarlane of Roper Greyell LLP. © 2016 Roper Greyell LLP—Employment + Labour Lawyers.

The BC Supreme Court has clarified in a judicial review decision that a union does not have an automatic right to participate in and be provided with information related to the process of accommodating a worker due to a protected ground: *Telus Communications Inc. v. Telecommunications Workers' Union*, 2015 BCSC 1570.

In the decision under review, the arbitrator had determined that a union's exclusive bargaining agency provided it with the right to represent employees with respect to any terms of conditions of employment, including accommodation requests. The arbitrator had considered bargaining evidence whereby the union had repeatedly attempted to have greater involvement in the accommodation process included in the collective agreement, but those proposals had been rejected by the employer. When addressing this evidence, the arbitrator found that there was no "mutual intention between the parties to the effect that the parties have essentially agreed [that] the [u]nion is not entitled to the right of notice, information and consultation that it seeks in the present grievance".

In making his finding, the arbitrator emphasized that employees can often be in vulnerable situations and said:

> Issues involving the accommodation of employees directly relate to a union's authority to represent its members, and its support amongst employees in the bargaining unit is fundamentally affected by those employees' perception of the union's ability to represent [them] in relation to significant matters grounded in the collective agreement. Cutting the union out of the accommodation process, grounded in the discrimination provision of the collective agreement, conflicts with the union's role as exclusive bargaining agent under the agreement and the *Canada Labour Code*.

The employer sought judicial review of this decision stating that a union may participate in an accommodation in certain cases, but that those were limited. If an accommodation fell outside of that limited class, the accommodation process fell within management's reserved rights or, alternatively, in the instant case was assigned to the employer through the operation of the collective agreement.

The Court applied the reasonableness standard in examining the decision. It rejected the expansive nature of the union's bargaining agency and said in particular:

> Telus generally has the right to direct employees as it considers advisable. The inclusion of "reasonable accommodation" among the matters within the purview of management is not manifestly inappropriate or contrary to [the union's] right to act as the sole collective bargaining agency ...
>
> The case law rather firmly supports Telus' view that "reasonable accommodation" does not fall within the "negotiating" or "bargaining" mandate of the [union] except in the circumstances outlined in the case law. The exceptions are well established: where there has been union participation in a discriminatory policy or rule; where the union's agreement is necessary to facilitate the accommodation, and no alternative can be found; or where an employee requests the involvement of the union.

The judge did expressly note, however, that the union may be granted participatory rights in the bargaining process. If such a right is granted, then so will the requirement to provide the union with all relevant information regarding the accommodation request.

This case is important because there is now a bright line in the general law regarding when a union **must** be included in the accommodation process. As the Supreme Court of Canada has stated, a union is required to assist in an appropriate accommodation and now the circumstances where that involvement must occur have been clarified. A union need only be involved where: (1) the union has participated in creating a discriminatory policy or rule; (2) the union's agreement is necessary to facilitate accommodation and no alternative can be found; and (3) an employee requests union involvement.

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PROGRESS OF LEGISLATION

Alberta Enacts New Essential Services Legislation

Alberta's new essential services legislation, *An Act to Implement a Supreme Court Ruling Governing Essential Services*, SA 2016, c. 10 (formerly Bill 4), came into force on May 27, 2016. The Supreme Court ruling referred to in the Bill's title is *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 CLLC ¶220-014, in which a majority of the Supreme Court of Canada determined that the restrictive essential services regime that then existed in Saskatchewan unconstitutionally violated the freedom of association.

Among other things, a new "Essential Services" division has been added to the *Labour Relations Code*, which concerns services "the interruption of which would endanger the life, personal safety or health of the public" and those "that are necessary to the maintenance and administration of the rule of law or public security." Provisions have also been added to the *Public Service Employee Relations Act* to account for strikes and lockouts of certain public sector workers.

Bill 4 received first reading on March 15, 2016, second reading on April 5, third reading on April 7, and Royal Assent on May 27. The majority of the Bill came into force on the date of Royal Assent, with certain transitional provisions deemed to have come into force on the date of first reading.

For a more detailed discussion of the new provisions, see *Labour Notes* no. 1543, dated March 30, 2016.

New Brunswick's Proposed Amendments to *Employment Standards Act* Receive Third Reading

Bill 30, *An Act to Amend the Employment Standards Act*, received third reading on May 18, 2016.

If passed, Bill 30 will amend the *Employment Standards Act* to:

- increase the maximum amount of compassionate care leave available to employees from eight weeks to 28 weeks;
- specify that, where an employer provides an employee's statements of wages electronically, it must provide the employee a means of making a paper copy of the statement at the employee's place of employment; and
- remove the obligation to retain records pertaining to employees' living allowances, and add an obligation to keep records of the date of cessation of an employee's employment for at least 36 months.

Bill 30 was first introduced on March 29, 2016 and received second reading on April 7. If passed, the amendments related to electronic statements and record-keeping would come into force on January 1, 2017, while the changes to compassionate care leave would take effect from the date of Royal Assent.

Proposed Newfoundland and Labrador Bill Would Amend *Labour Standards Act*

Bill 31, *An Act to Amend the Labour Standards Act*, received first reading on May 26, 2016, second reading on May 30, and third reading on May 31. If passed, Bill 31 would amend Newfoundland and Labrador's *Labour Standards Act* by including new provisions relating to the issuance of "clearance certificates". Clearance certificates would be issued by the Minister to indicate the status of employers under the *Labour Standards Act* as of the date of issuance of the certificate. The fee for issuing such a certificate would be $75.

If passed, Bill 31 would come into force 60 days after the day on which it receives Royal Assent. However, Bill 31 would also provide that $50 application fees collected for clearance certificates between April 1, 2013 and March 31, 2016 were imposed and collected validly.

Nova Scotia Passes Amendments to its *Labour Standards Code*

An Act to Amend Chapter 246 of the Revised Statutes, 1989, the Labour Standards Code, SNS 2016, c. 11 (formerly Bill 168), received Royal Assent on May 20, 2016.

Effective January 1, 2017, the *Labour Standards Code* ("Code") will be amended to expand and clarify the record-keeping requirements in subsection 15(1) of the Code. The changes are intended to align the employment records requirements in Nova Scotia with the other Maritime provinces.

In addition, a new provision will allow an employer to provide an employee's pay statement electronically if the employer provides confidential access to the statement and a means of making a paper copy of the statement at the employee's place of employment.

A number of minor drafting corrections will also be made throughout the Code.

New Bill Would Add Gender Identity to Prohibited Grounds of Discrimination under Quebec's *Charter of Human Rights and Freedoms*

On May 31, 2016, Bill 103, *An Act to strengthen the fight against transphobia and improve the situation of transgender minors in particular*, received first reading. While much of Bill 103 is dedicated to various amendments of the *Civil Code* pertaining to minors, it also proposes an amendment to the *Charter of Human Rights and Freedoms* which would expressly provide for protection from discrimination on the ground of gender identity.

If passed, Bill 103 would come into force on a date or dates to be set by the government.

FAMILY STATUS DISCRIMINATION: HRTO NARROWS "SELF-ACCOMMODATION" REQUIREMENT

— Jennifer Bernardo. This article originally appeared on the Baker & McKenzie LLP Canadian Labour and Employment Law *blog (www.labourandemploymentlaw.com). © Baker & McKenzie LLP. Reproduced with permission.*

A recent decision of the Human Rights Tribunal of Ontario (the "HRTO") has further defined the scope of the test for "family status" discrimination. Employees may not be required to take measures to find alternative arrangements for infrequent, sporadic or unexpected family needs, before seeking protection under the *Human Rights Code* (the *"Code"*).

Background

In *Miraka v. A.C.D. Wholesale Meats Ltd.*, 2016 HRTO 41, Mr. Miraka, an employee who had worked with the employer for one month, was awarded $10,000 for injury to his dignity, feelings and self-respect. Mr. Miraka was dismissed for being absent from work for three consecutive days.

On June 11th, 2012, Mr. Miraka received permission from the employer's office manager to stay home on the following day to care for his children, as his wife was ill. On June 13th, Mr. Miraka failed to show up for the start of his shift, calling in late to say that his wife was still ill and he would not be coming in. On June 14th, Mr. Miraka punched in on time, but left shortly thereafter because of a sharp pain in his back, which was later determined to be a hernia. Upon overhearing this, the employer's owner summarily dismissed Mr. Miraka.

Mr. Miraka alleged that the termination of his employment was discriminatory because it was based on his family status and/or disability. The HRTO agreed.

On the issue of family status, the employer argued, citing *Johnstone* [2014 FCA 110], that Mr. Miraka was required to make reasonable efforts to find alternative childcare arrangements for June 12th and 13th. Because Mr. Miraka had not tried to find someone else to care for his children, the employer argued that he should not receive protection under the *Code*.

The HRTO disagreed that Mr. Miraka was required to try to make alternative arrangements, because the situation only involved "an infrequent, sporadic or unexpected need to miss work", rather than a permanent or long-term childcare issue. While seeking assistance from close family members may be a reasonable expectation, Mr. Miraka could not be expected to have a babysitter "on call" or attempt to hire a stranger from "Craigslist" or "Kijiji" to look after his children, before falling within the *Code's* protection. Additionally, because the employer had given Mr. Miraka permission to be away from work on June 12th to care for his children, it could not use his absence on that date as a reason for dismissal.

Key Take-Aways

After the *Miraka* decision, employers should be wary of taking disciplinary action against employees for responding to infrequent, sporadic or unplanned family needs. While employees are expected to act reasonably in the face of childcare or eldercare issues, the nature and duration of the conflict, as well as the employee's personal circumstances, are important factors that will affect what is considered "reasonable". An employee may still be protected by the *Code*, even where he or she does not take any tangible steps to balance family and employer obligations, and instead prioritizes his or her family's needs.

RECENT CASES

Senior Salesperson Was Required To Provide Two Months' Notice of His Resignation

Ontario Superior Court of Justice, January 11, 2016

Jesso worked as a salesperson for Gagnon & Associates Inc. ("GA"). Jesso and Comeau, a fellow salesperson, were responsible for approximately 60 per cent of GA's sales. Although Jesso received regular and significant pay increases, he felt that he was underpaid in relation to other salespeople in the industry. Gagnon, the owner of GA, had a difficult time reaching an agreement with Jesso regarding compensation, and eventually Jesso and Comeau decided to look for employment elsewhere. They approached a rival engineering company about opening a new office, and submitted a business plan. When they were offered employment, Jesso and Comeau gave GA their letters of resignation. Gagnon was not expecting the resignations, and refused to accept the terms of the resignation letter. Jesso and Comeau joined the rival company and opened a competing office soon after. Some customers left GA and began a business relationship with the new office run by Jesso and Comeau, and GA had difficulty finding experienced salespeople to take their place. GA brought an action claiming that Jesso failed to give adequate notice of his resignation and breached his duty of good faith owed to GA. In response, Jesso argued that he had been constructively dismissed and counterclaimed for unpaid commissions from his last year of employment with GA.

The action and the counterclaim were allowed, in part. The employment contract between GA and Jesso began with a verbal contract. Further contracts were proposed over the years, but it was unclear what the terms of Jesso's contract were at the time of his dismissal since many of the terms of the proposed contracts were inconsistent with the verbal agreement, were not specifically discussed and agreed upon, and were not accompanied by new consideration. Based on email exchanges, the Court determined that Jesso and Gagnon both believed that Jesso was being paid based on commission calculated at 25 per cent of gross profit in his last year of employment. Jesso had not been constructively dismissed as there was no substantial alteration of the employment contract; the change to commission-based income was initiated by Jesso, not GA, and amounted to roughly the same pay he received in previous years, and thus it was not a substantial alteration of the employment contract. Regarding notice of his resignation, Jesso was a senior employee with 10 years' experience; although he was a salesperson with no managerial responsibilities, he was responsible for a significant percentage of GA's sales and the market for experienced salespersons was limited. In the circumstances, a notice period of two months was appropriate. Jesso was therefore liable for the losses sustained by GA during the two months of notice, which amounted to $35,164. With respect to breach of confidentiality, while Jesso was entitled to seek other employment and undertake preparations to compete with GA, the confidential information used in the business plan prepared by Jesso and Comeau violated their implied duty of good faith to GA; however, no damages flowed from this breach. With respect to Jesso's counterclaim, he was entitled to commission payments of $38,501 for those sales he had effectively completed while at GA but which were not invoiced until after he left. There was no agreement in place to have Jesso become a partner or owner of GA as there was no written agreement setting out agreed-upon terms, Jesso's pay did not remain static as contemplated by the alleged agreement, he was never paid alleged bonuses, he did not undertake any role in GA beyond salesperson, and Jesso specifically requested a change in compensation to a commission structure. Jesso's claim for punitive damages was dismissed.

Gagnon & Associates v. Jesso, 2016 CLLC ¶ 210-027

Employer Was Liable for Employee's Loss of Long-Term Disability Benefits After Making Negligent Misrepresentation Regarding Eligibility for Benefits During Pre-Employment Discussions

Supreme Court of British Columbia, January 26, 2016

Feldstein was 37 years old, and had cystic fibrosis. Given his condition, Feldstein sought employment that offered sufficient and appropriate long-term disability ("LTD") benefits that were not contingent upon the absence of a pre-existing health condition. When he was given six months' working notice from his former position, Feldstein interviewed for a position with 364 Northern Development Corporation ("364"). During the interview process, he inquired about LTD benefits, specifically the definition of "proof of good health" in order to qualify for benefits. He allegedly was informed that qualifying for benefits was tied to the successful completion of the three-month probationary period, without a medical questionnaire or examination. Based on this information, Feldstein accepted 364's job offer. Six months after he started working at 364, Feldstein's health began to deteriorate, ultimately resulting in him being unable to work while he awaited a double lung transplant. Having been informed by 364 that his pre-existing condition did not preclude access to benefits, Feldstein applied for LTD benefits. 364 terminated Feldstein after receiving assurances from the insurance company that termination would not affect his LTD benefits. Feldstein's LTD claim was approved, but he was informed by the insurance company that his LTD benefits would be restricted to $1,000 per month because he failed to fill out a health questionnaire when initially enrolled in the program. 364 unsuccessfully attempted to convince the insurer to extend excess LTD benefit coverage. Feldstein brought an action for damages for alleged negligent misrepresentation.

The action was allowed. 364 owed a duty of care to Feldstein as an employer making representations to a prospective employee in the course of pre-employment discussions. A reasonable person in the position of Feldstein would have believed, as a result of 364's statement, that LTD benefits would be available after working three continuous months at 364, without needing to complete a medical questionnaire or exam. The statement by 364 was inaccurate, untrue, and misleading. 364 did not take reasonable care to ensure the representations made during the hiring process were accurate and true. The person in charge of the hiring process knew, or ought to have known, that LTD benefits were an important, or even an essential, component of Feldstein's decision about whether to accept the employment. The person hiring Feldstein admitted he knew little about insurance policies and he took no steps to verify the accuracy of the information provided to Feldstein. As a result, the impugned statement was negligently made. Feldstein reasonably relied on the

impugned statement in opting to accept 364's offer of employment, as he specifically entered into an employment relationship with 364 on the strength of the statement at issue, believing he had received a satisfactory, clear, and certain answer about LTD benefits; he would not have accepted the position if the LTD benefits were inadequate. 364 knew that Feldstein would rely on its representations about the LTD benefits, and the person responsible for hiring was in a special relationship with Feldstein. 364 benefited from hiring skilled workers such as Feldstein, and the statements were made deliberately, in the course of their business, and in the context of a specific inquiry related to a prospective employment relationship. Feldstein was entitled to recover the LTD benefits he would have received for 40 months, with a deduction for Canada Pension Plan benefits already received. He was awarded aggravated damages of $10,000 for mental stress. There was no express term in the employment contract precluding a common law duty of care tort claim, or liability for negligence.

Feldstein v. 364 Northern Development Corp., 2016 CLLC ¶ 210-028

Court of Appeal Upholds Award of 26 Months' Reasonable Notice for Dependent Contractors

Court of Appeal for Ontario, January 27, 2016

Lawrence Keenan and his wife, Marilyn, (the "Keenans") worked as foremen for Canac Kitchens Ltd. ("Canac") for 32 and 25 years, respectively. They were initially employees, until Canac informed them that their work would continue as independent contractors. Under the new arrangement, the Keenans were responsible for paying installers, although Canac set the rates and provided the Keenans with the money to pay installers. The Keenans were paid on a piecework basis, no deductions were made by Canac, and the couple was responsible for any damages. The Keenans received Records of Employment from Canac indicating they had quit, although neither paid any attention to the records. The Keenans did not incorporate, and carried on business as Keenan Cabinetry, a sole proprietorship. For a number of years, the Keenans worked exclusively for Canac, although when work slowed down they spent a percentage of time working for a competitor, which Canac was aware of. Canac closed its operations and told the Keenans that their services were no longer needed; it provided no notice of termination or pay in lieu of notice. The Keenans brought an action for wrongful dismissal. The action was allowed, as the trial judge determined that the Keenans were dependent contractors and awarded them 26 months' reasonable notice (see 2015 CLLC ¶ 210-025). Canac appealed.

The appeal was dismissed. There was no basis for interfering with the trial judge's finding of exclusivity or near exclusivity. The Court was required to look at the full history of the employment relationship, in order to determine whether a worker was economically dependent due to exclusivity, or a high level of exclusivity. The Keenans worked exclusively for Canac for a large number of years. The services they provided to the competitor company were for a relatively short period of time, and occurred in response to a slowdown in work from Canac. The trial judge failed to expressly make a finding of exceptional circumstances to justify an award in excess of 24 months' reasonable notice. However, given the Keenans' ages and lengths of service, and the character of the positions that they held, there was no reason to interfere with the award of 26 months' reasonable notice.

Keenan v. Canac Kitchens Ltd., 2016 CLLC ¶ 210-029

Court of Appeal Rules that Arbitrator Had Jurisdiction to Hear Grievance Regarding Single Employer Declaration

Court of Appeal of New Brunswick, January 21, 2016

The Centre des arts La Petite église d'Edmundston Inc. ("CAPÉ") was a non-profit corporation created under the oversight of the City of Edmundston (the "City"). All of the City's services in the cultural sector were provided by CAPÉ. A posting was listed for a new position of administrative assistant in charge of operations at CAPÉ, and Savoie was hired. The Canadian Union of Public Employees, Local 60 (the "union") claimed the position should be unionized and brought a grievance. The arbitrator determined that the City and CAPÉ were two separate corporations, and the New Brunswick Labour and Employment Board (the "Board") had exclusive jurisdiction to make a single employer declaration. Therefore, the grievance was dismissed. A judge dismissed an application for judicial review, finding that the arbitrator was right to conclude that he did not have jurisdiction to dispose of the grievance, although for different reasons. According to the application judge, the section of the *Industrial Relations Act* relied upon by the arbitrator to find he did not have jurisdiction

to determine the grievance applied only to the construction industry, and therefore did not apply. Neither the arbitrator nor the Board were given the power to determine whether the two entities were one employer, outside of the construction industry, and neither had jurisdiction to resolve the grievance (see 2015 CLLC ¶ 220-049). The union appealed.

The appeal was allowed, and the matter was referred back to the arbitrator to determine. The arbitrator's decision was based on subsection 51.01(1) of the *Industrial Relations Act*, which was not applicable in this situation. As a result, the decision was neither correct nor reasonable and could not stand. The arbitrator correctly identified the actual nature of the grievance; namely, the union was arguing that the City, despite the transfer of its services in the cultural sector to CAPÉ, had contravened the collective agreement concerning the posting and salary of the administrative assistant position. The application judge should have recognized the arbitrator's jurisdiction to determine this grievance, as it dealt with a dispute concerning the interpretation, application, or alleged violation of the collective agreement. Therefore, in holding that the arbitrator did not have jurisdiction to determine the grievance since the legislature did not vest this power in him, the application judge committed a reversible error of law.

Canadian Union of Public Employees, Local 60 v. Edmundston (City), 2016 CLLC ¶ 220-025

Labour Relations Board Rules that Unfair Labour Practice Complaint Should Be Deferred To Arbitration

British Columbia Labour Relations Board, January 25, 2016

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-417 (the "union") represented unionized employees of Tolko Industries Ltd. ("Tolko") at a lumber mill. Hara, a member of the union, worked for Tolko as a journeyman welder. Hara was involved with the union as an elected safety chairperson, which required him to seek leaves of absence from work when there was a conflict between his union activities and his work schedule. After eight years of working a Tuesday to Saturday shift, Tolko changed Hara's work schedule to a weekend shift. Three grievances were filed with respect to Hara. One grievance concerned contracting out, one alleged bullying and harassment with respect to job changes, and one concerned contracting out certain work. At the same time, the union brought an unfair labour practice complaint claiming that Tolko had altered Hara's shift schedule in a manner that compromised his ability to be involved with the union. The employer argued that the matter fell within the Labour Relations Board's (the "Board") policy of deferring to arbitration.

The complaint was dismissed. The union, in this complaint, alleged that changing Hara to a weekend shift interfered with his ability to attend to his union duties and was motivated by anti-union *animus*. Since there was no resulting cost savings or increased efficiencies, the union claimed that Tolko had no legitimate business justification for the shift change. The complaint turned on whether the employer had acted within the scope of its management rights under the collective agreement, which could be appropriately decided by collective agreement arbitration. The arbitrator was capable of interpreting and applying the collective agreement to address the issues identified by the union, and to provide a remedy if a breach was found, including a remedy to deal with whether Tolko could change Hara's work schedule. Requiring the Board to determine matters arising under the *Labour Relations Code* while deferring the remaining issues to arbitration would create a bifurcation of proceedings. The Board's practice was to defer to arbitration where an arbitrator had the jurisdiction to determine whether conduct amounted to an unfair labour practice. Since this complaint dealt with disputes that were appropriately determined through collective agreement arbitration, the Board declined to inquire into the complaint.

Tolko Industries Ltd. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-417, 2016 CLLC ¶ 220-026

Proposed Class Action Regarding Claim of Negligence Against Government for Alleged Discrimination of Female RCMP Officers Disclosed a Cause of Action

Ontario Superior Court of Justice, December 22, 2015

The Royal Canadian Mounted Police ("RCMP"), Canada's national police force, is governed by section 3 of the *Royal Canadian Mounted Police Act* ("RCMPA"). Davidson joined the RCMP in 1985, and remained part of active service until

she left on an extended medical leave in 2009. She remained on medical leave until her retirement from the RCMP in 2012. Davidson alleged that she was subject to discrimination, bullying, and harassment from 1986 until 2009, excluding the period from 2004 to 2005. She brought a claim to certify a class action against the Attorney General of Canada (the "Crown") for negligence and breach of employment contract. According to her claim, Davidson and her fellow female officers, along with female civilian members of the RCMP, were victims of sexual harassment and sexual discrimination by the RCMP. She claimed that she and her female colleagues were subjected to sexual discrimination, bullying, and harassment by male members of the RCMP between 1986 and 2009. The Crown brought a motion to have her claim dismissed for failure to disclose a reasonable cause of action.

The motion was allowed, in part, and the claim in contract was struck. Any issue about whether Davidson's claim was statute-barred by the two-year limitation period would have to be determined on a motion for summary judgment, or at trial, as Davidson could claim that she was incapable of commencing her action earlier as a result of her physical, mental, or psychological condition. The employment relationship between the Crown, or the RCMP, and RCMP members was fashioned by statute, not contract. Therefore, Davidson did not have a claim in contract, and that portion of her claim must be dismissed. The pleadings included alleged breaches of the RCMPA and its regulations. She was not asserting a breach of statute as a cause of action. Rather, she was claiming that the statutory breaches were relevant to her common law negligence claim. She had a reasonable individual cause of action for negligence for the harm done to her by individual male RCMP officers and civilian members, each of which were Crown servants. The vicarious liability in the context of the *Crown Liability and Proceedings Act* ("CLPA") was a statutory vicarious liability, and was an exception to the Crown immunity from tort claims at common law. The *Class Proceedings Act, 1992* could not be used as a source of substantive law to circumvent the substantive law of the CLPA. The Crown could not be directly liable for its own negligence in failing to stop the misconduct occurring among male RCMP officers and male civilian members. Sections 3 and 10 of the CLPA set out that the Crown is only vicariously liable if a Crown employee commits a tort recognized by law. It was not plain and obvious that Davidson was making a claim against the RCMP as an institution. The claim could be a negligence claim by female servants of the RCMP against male servants of the RCMP, who collectively sexually harassed or discriminated against their female colleagues, or who facilitated, acquiesced, or condoned the misconduct against their female colleagues. Any acts of systemic negligence by male Crown servants of the RCMP would be an action for which the Crown would be vicariously liable. Davidson satisfied the cause of action criterion for certification of her class action.

Davidson v. Canada (AG), 2016 CLLC ¶ 220-027

Tribunal Finds Discrimination on the Basis of Family Status Where an Employee Was Fired After Taking Time Off To Care for His Children While His Wife Was Sick

Human Rights Tribunal of Ontario, January 11, 2016

Miraka began working for A.C.D. Wholesale Meats Ltd. ("ACD") as a delivery truck driver on a full-time basis on May 14, 2012. After working a full shift on June 11, 2012, Miraka informed ACD that he would be unable to work the following day because his wife was ill and was unable to look after their children. He was informed that it was fine. Since his wife had still not improved, Miraka did not show up to work on June 13, 2012, as expected. He did not inform ACD prior to the start of his shift that he would not be attending work, and instead called ACD at around 11 a.m. to say that he was unable to work because he was still needed to take care of the children. Miraka returned to work on June 14, 2012. However, soon after punching his time card, he felt a sharp pain in his side and realized he would not be able to continue working. After informing ACD that he could not work, Miraka was terminated. He was subsequently diagnosed with a hernia, and brought in a Workplace Safety and Insurance Board ("WSIB") form indicating that he was capable of resuming modified duties, as long as he avoided lifting, pushing, and pulling heavy objects. His WSIB benefits claim was allowed to August 9, 2012, based on the determination that the hernia was work-related and occurred while working for ACD. Miraka brought a human rights complaint alleging discrimination on the basis of family status and disability.

The complaint was allowed. Miraka was unable to work on June 12 and 13 as a result of his family status. His wife, who normally took care of the children, was ill, and without him the children would have been effectively unsupervised and at risk of harm. Miraka was required to miss work because of substantive obligations that engaged his legal responsibilities

as a parent to ensure that his young children were safe and secure. Requiring him to go to work and leave his children with his wife while she was unable to care for them would have interfered with the fulfillment of his substantive obligations to his children. The requirement to demonstrate reasonable efforts to make alternative child care arrangements did not apply here, since it was a short-term, unexpected need to miss work to take care of his children. Miraka's actions were reasonable in the circumstances. He was required to leave work on June 14 as a result of his hernia, for which he claimed and received WSIB benefits. This meant that his absence was a result of his disability. ACD terminated Miraka in whole or in part as a result of his Code-related absences on June 12, 13, and 14. He was terminated because of his failure to attend work for three consecutive days, and both his family status and disability-related absences were a significant part of the reason for terminating him. Miraka was awarded $10,000 for injury to his dignity, feelings, and self-respect caused by having his employment terminated for circumstances beyond his control. Lost wages were not awarded, since Miraka's hernia left him unable to work or earn any income after he was terminated.

Miraka v. A.C.D. Wholesale Meats Ltd., 2016 CLLC ¶ 230-020

THE ECONOMY

The statistics below provide a convenient overview of the latest Consumer Price Index (CPI) and other economic and labour indicators of interest. Do you need detailed CPI figures for all of Canada, individual provinces, regional cities, or specific goods and services (e.g., housing, food, and transportation)? If so, you can find the detailed CPI figures in the "Consumer Price Index" tab division of Volume 1 at ¶ 26 *et seq*.

Cost of Living — *Up*

The Consumer Price Index figure for April 2016 on the 2002 = 100 time base, was 128.3, up 1.7% from the April 2015 figure of 126.2. On a monthly basis, the April 2016 percentage figure was up 0.3% from March 2016. On the 1992 = 100 time base, the April 2016 All-Items figure was 152.7.

Industrial Production — *Down*

The preliminary, seasonally adjusted figure of industrial production for the month of March 2016, in chained 2007 dollars, was estimated at $350,908 million, down 0.1% from the revised March 2015 figure of $351,278 million.

Weekly Earnings — *Up*

In March 2016, the average weekly earnings (including overtime), seasonally adjusted at the industrial aggregate level were $960.30, up 0.7% from $953.26 in March 2015, according to a preliminary estimate based on a sample survey of reporting units.

Unemployment — *Down*

For April 2016, the seasonally adjusted number of unemployed persons totalled 1,383,200, down 1,700 from March 2016, with an unemployment rate of 7.1% of an active labour force of 19,424,600. The employment level in April 2016 was 18,041,400.

Work Stoppages — *Down*

For major collective bargaining agreements (those with 500 or more employees) in March 2016, there were 8,060 person days lost from 11 work stoppages. For March 2015, there were 117,935 person days lost from 62 work stoppages.

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