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# Labour Notes®

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## EMPLOYER LIABLE FOR LONG-TERM DISABILITY COVERAGE DURING THE COMMON LAW NOTICE PERIOD

*By: Kelly O’Ferrall, associate with Stikeman Elliott LLP. This article first appeared in the Stikeman Elliott CANADIAN EMPLOYMENT AND PENSION LAW BLOG. © Stikeman Elliott LLP. Reproduced with permission.*

In *Brito v. Canac Kitchens* [2011 ONSC 1011], the Ontario Superior Court awarded substantial damages against the employer for wrongful dismissal, including damages for lost disability benefits, payment in lieu of a 22-month notice period and \$15,000 in punitive damages due to the employer’s “hardball” approach to the termination of a long-service employee. The case should serve as a warning to employers who provide only the statutory minimum amount of notice to employees upon termination without cause and plan to negotiate and/or litigate additional entitlements at a later date.

### Facts

The employee, Luis Romero Olguin, had worked for Canac Kitchens for 22 years. He was 55 years old at the time he was terminated without cause as a result of a restructuring. Upon termination he was given the statutory minimum amount of 8 weeks’ pay in lieu of notice, plus benefits for the same period. While Mr. Olguin found a new job less than a month later, it was lower-paying and did not offer disability benefits.

Approximately four months after Mr. Olguin was terminated, he began treatment for cancer, rendering him totally disabled and unable to work. He brought an action for wrongful dismissal, including a claim for damages in lieu of disability benefits.

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## Decision

Mr. Olguin was awarded a 22-month notice period and Canac was ordered to pay damages in lieu of short-term and long-term disability benefits, including the present value of the remainder of his long-term disability entitlements to his 65th birthday. In coming to this decision, Justice Echlin observed (at para. 13):

Canac consciously chose not to make alternative arrangements to provide its loyal, long-service employee with replacement disability coverage. Rather, it chose to go the “bare minimum” route. It provided only the statutory minimums in pay and benefits and then gambled that he would get another job and stay well. When it lost that gamble, it chose to litigate this matter for over five years. When confronted with its potential significant exposure, it raised the argument that Mr. Luis Romero Olguin failed to mitigate his potential damages by purchasing a replacement disability policy.

Canac failed to establish the plaintiff’s failure to mitigate damages, and Justice Echlin found that insufficient evidence had been led to show that comparable replacement coverage would have been available.

In addition to the award for disability benefits, which was in excess of \$200,000, Justice Echlin awarded the plain-

tiff \$15,000 in punitive damages, having regard for “Canac’s cavalier, harsh, malicious, reckless, outrageous and high-handed treatment” of the plaintiff and their “hardball approach”.

## Our Views

This case should serve as a reminder to employers that courts will ensure that employees who are dismissed without cause are “made whole” and will not be limited to statutory minimums when doing so. In addition, *Brito v. Canac Kitchens* makes clear that courts will extend liability to forms of compensation outside the ambit of traditional remuneration, including disability benefits. Prudent employers should take proactive steps to mitigate these sources of liability by, for example, advising employees of replacement disability coverage, extending disability benefits to terminated employees where possible, offering realistic rather than “base minimum” separation packages or entering into employment agreements with employees which clearly outline employees’ post-termination entitlements.

This decision is also relevant for employers who choose to frequently litigate employment matters before the courts. It appears from the reasons that Canac’s continued strategy of exposing terminated employees to extended litigation impacted the Judge’s decision in this case.

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## PROGRESS OF LEGISLATION

### Manitoba

#### *Employment Standards Code Amendments*

Bill 23, the *Employment Standards Code Amendment Act*, which will make it easier for employers and employees to enter into flexible work hour agreements, has received Royal Assent. Flexible hour agreements could accommodate employers’ needs while allowing employees to better balance their work hours with their home and family needs.

Among the amendments, the Bill will:

- extend the exceptions to the Code’s statutory holiday provisions to climate-controlled agricultural businesses;

- allow an employer and employee to enter into a written flextime agreement, in which an employee may work up to 10 hours per day or 40 hours per week;
- replace the “wilful misconduct” standard for termination without notice with a “just cause” standard; and
- allow an employer to apply for an averaging permit to increase employees’ hours in a workweek, or to average the hours across a longer period; 75% of affected employees must be in favour of such a permit for it to be granted.

Bill 23 received first reading on April 20, 2011, second reading on June 6, and third reading and Royal Assent on June 16. It will come into force on January 1, 2012.

## Quebec

### Legislation To Restructure Certain Government Bodies

As part of its action plan to reduce and control expenditures, the Government of Quebec has passed legislation which proposes to restructure a number of government bodies and funds. Bill 130, which received Royal Assent on June 13, will abolish or merge a number of government departments, including the following bodies which deal with employment and labour matters:

- The Conseil consultatif du travail et de la main-d’œuvre will be integrated into the Ministère du Travail. The assets and personnel of the Conseil will be transferred to the Ministère, which will assume the Conseil’s obligations and continue the examination of any complaints.
- The activities of the Conseil des services essentiels will be taken over by the Commission des relations du travail. The Commission will acquire the Conseil’s rights and continue any matters pending before the Conseil. The term of the members of the Conseil will end when Bill 130 comes into force; however, members may be qualified for appointment as commissioners of the Labour Relations Division of the Commission.
- The activities of the Commission de l’équité salariale will be taken over by the Commission des normes du travail, which will be renamed the Commission des normes du travail et de l’équité salariale. Current members of the Commission de l’équité salariale will become commissioners of a Pay Equity Division which will be established within the new Commission and will continue any pending matters.

Bill 130 received first reading on November 10, 2010, second reading on February 16, 2011, third reading on June 8, and Royal Assent on June 13. Readers will be informed when the Bill is proclaimed in force.

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## HIGHLIGHTS OF THE FEDERAL BUDGET

On June 6, 2011, Minister of Finance James M. Flaherty reintroduced federal Budget 2011, “The Next Phase of Canada’s Economic Action Plan – A Low-Tax Plan for Jobs and Growth”. The Budget had been previously released on March 22, 2011; however, that Budget was not adopted prior to the dissolution of Parliament on March 26, 2011.

The 2011 federal Budget contains the following measures related to Employment Insurance (“EI”) and employment standards.

### EI Hiring Credit for Small Business

To encourage additional hiring by small businesses, Budget 2011 proposes a temporary Hiring Credit for Small Business of up to \$1,000 against a small employer’s increase in its 2011 EI premiums over those paid in 2010. This temporary credit will be available to approximately 525,000 employers whose total EI premiums were at or below \$10,000 in 2010, reducing their 2011 payroll costs by about \$165 million.

### EI Work-Sharing Program Extended

The work-sharing program protects jobs and avoids layoffs by offering EI benefits to workers willing to work a reduced workweek while their company recovers. Budget 2011 provides \$10 million in additional support by making available an extension of up to 16 weeks for active or recently terminated work-sharing agreements. The extension will be phased out by October 2011.

## EI Pilot Projects Renewed

In October 2010, the government announced the continuation of three EI pilot projects. The Extra Five Weeks pilot project was renewed until 2012, while the other two – Working While on Claim and Best 14 Weeks – were scheduled to expire in the summer of 2011. Budget 2011 provides \$420 million to renew these two pilots for one year.

The Working While on Claim pilot project, available across Canada, will allow EI claimants to earn additional money while receiving income support. It will be renewed until August 2012.

The Best 14 Weeks pilot project, which allows claimants in 25 regions of higher unemployment to have their EI benefits calculated based on the highest 14 weeks of earnings over the year preceding a claim, will be renewed until June 2012.

## Limiting EI Premium Rate Increases and Launching EI Consultations

The increase in EI premiums is limited to five cents per \$100 of insurable earnings for 2011 and 10 cents for subsequent years. The government will be launching web-based and roundtable consultations on how to improve the EI rate-setting mechanism to ensure more stable, predictable rates going forward.

## Expanding the Wage Earner Protection Program

The Wage Earner Protection Program (“WEPP”) provides guaranteed and timely compensation to workers for unpaid wages, vacation pay, severance pay, and termination pay earned in the six months preceding an employer’s bankruptcy or receivership. Budget 2011 will extend the WEPP to also cover employees who lose their jobs when their employer’s attempt at restructuring takes longer than six months, is subsequently unsuccessful, and ends in bankruptcy or receivership. The enhanced protection is estimated to provide an additional \$4.5 million annually in support to workers affected by the bankruptcy of their employer.

## Eliminating the Mandatory Retirement Age

The government proposes to introduce amendments to the *Canadian Human Rights Act* and the *Canada Labour Code* to prohibit federally regulated employers from setting a mandatory retirement age unless there is a *bona fide* occupational requirement. This would allow Canadians to choose how long they wish to remain active in the labour force. The government will review other Acts to further this objective.

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## Recent Cases

**NOTE:** The full text of these cases can be found in the “New Matters” tab division of Volume 5 at the paragraph number indicated at the end of each summary.

### Failure to give notice was not an offence in respect of the discharge of an employee

• • • **British Columbia** • • • Servisair provided aviation ground services at Vancouver International Airport. Employees in the cabin grooming service were unionized and covered by a collective agreement. Servisair determined that the cabin grooming division was not profitable, and advised the union to make changes. When the union refused to negotiate, Servisair notified employees that the cabin grooming service would likely be outsourced to a third party. The union then entered into negotiations and agreed to a new wage package, which was voted down by its members. Servisair then decided to close the division. It gave notice that the division would be closing, although it did not specify a date. Servisair gave written notice on

April 18, 2008 that employees would be terminated as of May 25, 2008, and applied for a waiver of the termination notice requirement. The waiver application was denied. Individual termination letters were sent to each employee. Servisair plead guilty to failing to notify the Minister of Labour of its intention to terminate a group of 50 or more employees 16 weeks prior to termination, and failing to provide a statement in writing to each employee two weeks before termination setting out the particulars of their employment. At issue was the appropriate penalty.

An award of damages was granted. A conviction for failing to give the required notice to the Minister was not an offence in respect of the discharge of an employee. There was no clear relationship between the termination notice to the employees and the notice to the Minister. In

this situation, the employees were aware long before the notice to the Minister that their department was closing and their jobs would be terminated at some point in the near future. Therefore, the Court would not use its discretion to award wages for the period between May 26 and August 7. The company was ordered to pay \$3,000 for failure to provide notice to the Minister, and \$1,500 for failure to provide statements of wages and benefits within the required time frame.

*Regina v. Servisair Inc*, 2011 CLC ¶210-025 (B.C. Prov. Ct.)

### **Motion to certify class action denied since issues lacked commonality**

• • • **Ontario** • • • On July 24, 2007, Allstate issued a general announcement letter to all active agents, informing them that, effective September 1, 2009, a revised product distribution model and agent compensation system would be implemented. A number of agents alleged that this new model unilaterally changed fundamental terms of their employment contracts, and that these changes constituted constructive dismissal. The employees resigned and commenced a proposed class action, seeking termination and severance pay under the *Employment Standards Act, 2000*.

The motion to certify the proposed class action was denied. At issue was whether an action alleging constructive dismissal was suitable for certification. A constructive dismissal requires a unilateral change to a fundamental term of the employment contract. In determining whether the class action should be certified, the Court looked at the five requirements for certification. First, the statement of claim disclosed a cause of action. Second, the class definition provided an identifiable class of persons with a potential claim against Allstate. However, the issues proposed by the potential class lacked commonality. In order to determine a constructive dismissal claim, individual fact-finding and legal analysis would be required to determine the answer for each member of the proposed class. Therefore, a class action was not the preferred procedure. Rather, individual trials would be required for each class member.

*Kafka v. Allstate Insurance Company of Canada*, 2011 CLC ¶210-026 (Ont. S.C.)

### **Restrictive covenant was overly broad and unreasonable**

• • • **Ontario** • • • When Mason was hired to work for Chem-Trend, a worldwide company, he signed a document that included a restrictive covenant. Upon termination, he was restricted, for one year, from competing with

Chem-Trend by providing services to, or soliciting business from, Chem-Trend's customers. When Mason was terminated, he brought a wrongful dismissal action, as well as a separate application alleging that the restrictive covenant was unenforceable. The trial judge dismissed the application, finding that the restrictive covenant was clear, unambiguous, and reasonable (see 2011 CLC ¶210-005). Mason appealed.

The appeal was allowed. The restrictive covenant at issue was clear and unambiguous. However, the trial judge erred in finding that a complete prohibition on competing with the company was not an overly broad restriction. There was a separate covenant in the agreement protecting trade secrets and confidential information. The prohibition on dealing with former customers of the company was also overly broad, in particular the requirement that Mason not deal with any former customers in competition with the company. Given the worldwide nature of the company, it was impossible to know which former customers Mason could not deal with. Therefore, the complete prohibition on competition for one year was overly broad and unworkable; consequently, the restrictive covenant was unreasonable and unenforceable.

*Mason v. Chem-Trend LP*, 2011 CLC ¶210-027 (Ont. C.A.)

### **Employer was not entitled to treat economic circumstances as just cause**

• • • **Alberta** • • • Dahlgren was a single mother who worked as the bar manager at J.D.'s Bar, which was owned and operated by 1093777 Alberta Ltd. When the business suffered, due to economic conditions, the bar had to reduce its operating days to only four days per week. In addition, Dahlgren was asked to change her position to bartender, so that the owner could take over the bar manager duties herself. Dahlgren resigned and brought an action for constructive dismissal.

The action for constructive dismissal was allowed. The employer was not entitled to treat economic circumstances as just cause. The change from bar manager to bartender was a substantial change, as the duties and responsibilities were different, and the basis of remuneration changed from a monthly salaried position to an hourly position. However, by failing to accept the bartender position, Dahlgren failed to mitigate her loss. She could have accepted the three weeks' holiday on offer, returned, worked as a bartender, and sought other employment in order to reduce her loss of income. Dahlgren was awarded three months' reasonable notice.

*Dahlgren v. 1093777 Alberta Ltd.*, 2011 CLC ¶210-028 (Alta. Prov. Ct.)

## Arbitrator's decision was flawed, but did not contain a reviewable error

● ● ● **Saskatchewan** ● ● ● Marcia and Hopkins were interviewed for a job posting with the Saskatchewan Institute of Applied Science and Technology ("SIASST"). Under the collective agreement, a candidate was required to satisfy minimum requirements to be considered for a job opening. Specifically, candidates were required to score at least 60 per cent on the interview questions. Neither Marcia nor Hopkins received an overall score of 60 per cent, and therefore, both were ruled out of the selection process. An arbitrator upheld their grievances, finding flaws in the interview process. On an application for judicial review, the chambers judge set aside the arbitrator's award. The two grievors appealed.

The appeal was allowed, in part. The arbitrator did not make a reviewable error by finding that the 60 per cent score requirement was not a valid means of determining whether an employee met the threshold requirements. However, the arbitrator's decision was flawed in other respects. The arbitrator's emphasis on seniority was misplaced and unreasonable, since seniority was not an issue with respect to the minimum qualifying standard. The arbitrator also imposed her own sense of the most effective system on the employer and the union, instead of relying on the system set out in the collective agreement. Finally, the arbitrator overlooked the terms in the collective agreement dealing with the required standard of review of the employer's decision with respect to job candidates. Therefore, the appeal was allowed to the extent of confirming the arbitrator's decision to uphold the grievances on the basis that the interview process was fatally flawed.

*Saskatchewan Government and General Employees Union v. Saskatchewan Institute of Applied Science and Technology*, 2011 CLLC ¶220-030 (Sask. C.A.)

## Employee not entitled to human rights protections

● ● ● **Newfoundland and Labrador** ● ● ● Leonard, who worked for Noble Drilling, was required to take a helicopter flight to get to his work site. After Leonard boarded a flight, another employee discovered a marijuana cigarette in the reception area where the helicopter took off. As a result, Noble Drilling performed a drug test on all employees on that helicopter flight. Leonard tested positive for drugs and, as a result, he was suspended. Although Leonard passed a subsequent drug test, he was terminated. His human rights complaint was dismissed on the grounds that he was not disabled, and therefore was not entitled to human rights protection (see 2010 CLLC ¶230-016). Leonard appealed.

The appeal was dismissed. In determining whether *prima facie* discrimination exists, a board of inquiry must first determine if a prohibited ground of discrimination exists. In this case, the Board determined that there was no perceived disability, and therefore, no prohibited ground of discrimination. The decision by the Board to dismiss the complaint was within the range of acceptable outcomes.

*Leonard v. Human Rights Commission*,  
2011 CLLC ¶230-021 (N.L.T.D.(G.))

## Tribunal erred in its determination of *bona fide* occupational requirement

● ● ● **Canada** ● ● ● Vilven and Kelly were forced to retire from their positions as pilots with Air Canada when they turned 60 years of age, in accordance with the mandatory retirement provisions of the collective agreement in force between the Air Canada Pilots Association and Air Canada. Vilven and Kelly brought a human rights complaint, alleging discrimination on the basis of age. The Tribunal dismissed the complaint (see 2008 CLLC ¶230-011). An application for judicial review was upheld (see 2009 CLLC ¶230-019), and the matter was remitted back to the Tribunal. On reconsideration, the Tribunal found that paragraph 15(1)(c) of the *Canadian Human Rights Act* was not a reasonable limit under the *Canadian Charter of Rights and Freedoms* (the "Charter"), and that Air Canada had not established that the mandatory retirement provisions were a *bona fide* occupational requirement (see 2010 CLLC ¶230-011). The pilots were ordered reinstated (see 2010 CLLC ¶230-040). Air Canada and the union applied for judicial review.

The applications for judicial review were allowed, in part. The Supreme Court of Canada decision, *McKinney v. University of Guelph* (91 CLLC ¶17,004), was distinguished. In this case, the Tribunal was correct in finding that paragraph 15(1)(c) was not saved by section 1 of the Charter. The objective of the legislation was to balance the need for protection against age discrimination and the desirability of those in the workplace to bargain for and organize their own terms of employment. The negotiation of mandatory retirement arrangements between employers and employees, specifically through the collective bargaining process, was a pressing and substantial objective. There was a rational connection between mandatory retirement and the maintenance of socially desirable employment regimes. However, older workers' Charter rights were not minimally impaired by paragraph 15(1)(c). The objectives could be attained without impairing the Charter rights of workers over the normal age of retirement to the extent allowed under the current legislation. Finally, the benefits from the legislation were outweighed by its deleterious effects. As a result, paragraph 15(1)(c) violated subsec-

tion 15(1) of the Charter by denying equal protection and equal benefit of the law to workers over the normal age of retirement for similar positions. In considering whether Air Canada had established that being under 60 years of age was a *bona fide* occupational requirement for being a pilot, the Tribunal incorrectly found that the parties had conceded that the policy was adopted for a purpose rationally connected to the performance of the job. It was adopted in an honest and good faith belief that it was necessary to fulfill that legitimate work-related purpose.

The Tribunal also did not undertake a reasonable analysis of the evidence to determine if the standard was reasonably necessary to accomplish the legitimate work-related purpose. The Tribunal was ordered to reconsider the evidence relating to whether age was a *bona fide* occupational requirement.

*Air Canada Pilots Association v. Kelly and Vilven*,  
2011 CLC ¶230-022 (F.C.)

## Q & A

### How do I know if an employee is considered “federal” or “provincial” for employment standards purposes?

Each of the federal, provincial, and territorial governments have passed laws setting out rules that employers must follow when dealing with their employees. Since these laws can vary widely between different jurisdictions, it is important to know which laws apply to your organization and employees.

Generally speaking, the federal government has jurisdiction over organizations of an interprovincial, national, or international nature. This includes, but is not limited to, matters such as:

- interprovincial and international services such as:
  - railways (including Canadian National Railway),
  - highway transport,
  - telephone, telegraph, and cable systems,
  - pipelines, canals, ferries, tunnels, and bridges, and
  - shipping and shipping services;
- radio and television broadcasting, including cablevision;
- air transport, aircraft operations, and aerodromes;
- banks;
- undertakings for the protection and preservation of fisheries as a natural resource;
- First Nations communities and activities;
- uranium mining and processing and atomic energy; and
- undertakings declared by Parliament to be for the general advantage of Canada, such as most grain elevators, flour and seed mills, feed warehouses, and grain-seed cleaning plants.

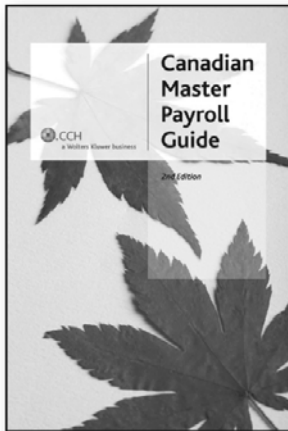
Employees in these industries are considered “federal” and their working conditions are governed by the *Canada Labour Code*.

For industries of a more local nature, employees are considered “provincial” and are subject to provincial employment standards laws. For provincial employees, it is important to note that if an organization has employees in more than one province, an employee’s rights are governed by the laws of the province where he or she is working, and not the province where the organization has its head office.

Determining the jurisdiction of an organization can sometimes be a tricky question. If you are unsure about which employment standards laws apply to you, you can contact the Employment Standards Office nearest you for guidance.

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