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LATEST DECISION ON RANDOM DRUG TESTING

Background

In a frequently cited decision from 2000 regarding drug and alcohol testing, *Entrop v. Imperial Oil Limited* ("*Entrop*"), the Ontario Court of Appeal struck down Imperial Oil's random drug testing policy on the basis that the test could not detect actual impairment on the job.

In response to the decision, Imperial Oil ceased random drug testing until July 2003 when it reinstituted random drug testing using saliva testing that could detect current cannabis impairment. The Union challenged Imperial Oil's random alcohol and drug testing.

Decision

In a 2005 preliminary award, Arbitrator Picher dismissed the Union's challenge to random alcohol testing since the employer had engaged in this practice since 1992 without challenge by the Union.

In a December 11, 2006 award, Arbitrator Picher held that random drug testing was not a permissible exercise of management rights, despite the fact that Imperial Oil's testing could detect current cannabis impairment.

Arbitrator Picher based his decision on the existing Canadian arbitral jurisprudence regarding drug testing in safety sensitive workplaces which he coined the "Canadian Model". Arbitrator Picher summarized the elements of the Canadian Model as including the following elements:

1. Random alcohol or drug testing is not permitted, unless it is part of an agreed rehabilitation program.
2. Employers can require alcohol or drug testing in the following circumstances:

   (a) If the employer has reasonable cause to suspect an employee is under the influence of alcohol or drugs;

   (b) If there has been a significant incident, accident or near miss where it is important to identify the root cause of what occurred; and

   (c) As part of an employee's alcohol or drug rehabilitation program. In the case of rehabilitation, employers may require random unannounced alcohol or drug testing for a limited period of time.
3. An employee's refusal or failure to submit to an alcohol or drug test in the circumstances set out in (2) above will be viewed as a serious violation of the employer's alcohol and drug policy and may be grounds for serious discipline.

In summarizing the arbitral jurisprudence on drug testing, Arbitrator Picher noted that industrial relations experience for over 20 years established that the Canadian Model was effective in achieving safety goals without imposing random alcohol or drug testing on employees. He stated that random drug testing outside the context of a rehabilitation plan is:

"an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and enforcement of safe practices."

Arbitrator Picher noted that random testing might be justified in some extreme circumstances such as an "out-of-control drug culture taking hold in a safety sensitive workplace."

Arbitrator Picher distinguished the *Entrop* decision in which the Ontario Court of Appeal held that random drug testing was not allowed because it could not detect current impairment, on the basis that the Court in *Entrop* was applying the *Human Rights Code* to the situation of a recovering alcoholic not to the application of a collective agreement in the context of the Canadian arbitral jurisprudence. In addition, even if *Entrop* was applicable Picher held that Imperial Oil's revised policy would not pass the test because the results from the saliva tests were not available for several days following the test during which time the employee was sent back to work in a safety sensitive environment.

Implication

This award reinforces the existing arbitral jurisprudence which does not permit random drug testing unless evidence establishes a significant safety risk. Given the threshold of an "out of control drug culture" set out by Arbitrator Picher, it will be difficult for employers to establish the requisite safety concerns to justify random drug testing.

With regard to random alcohol testing, if the Union had not acquiesced to the random breathalyser testing for 12 years, it is our view that on the basis of Arbitrator Picher's analysis, he may well have struck down this portion of the policy as well.

Imperial Oil has applied for judicial review of this arbitration award to the Ontario Divisional Court.

Imperial Oil Ltd. and *Communications, Energy and Paperworkers Union of Canada, Loc. 900* (2006) (Picher) (unreported)

Nicole Skuggedal

UPDATE ON MANDATORY RETIREMENT

Effective May 2007 mandatory retirement will not be generally permissible in Newfoundland and Labrador.

In British Columbia, the Premier's Council on Aging and Seniors' Issues released its report, *Aging Well in British Columbia* in late 2006. One of its key recommendations was that, "the B.C. government immediately change the *Human Rights Code* to extend human rights protections to those over the age of 65, thereby eliminating mandatory retirement in B.C." In the February 2007 speech from the throne, the provincial government stated that it will introduce legislation to end mandatory retirement as recommended by the Premier's Council.

In January, the federal Minister of Human Resources and Social Development, Monte Solberg, announced the appointment of a panel to examine the role of older Canadians in the workplace. The panel is chaired by retired senator, the Honourable Erminie Cohen.

As reported in previous newsletters, mandatory retirement is no longer generally permissible in Alberta, Manitoba, Ontario, Quebec, P.E.I., the Yukon, the N.W.T. and Nunavut. Legislation has been introduced to eliminate mandatory retirement in Saskatchewan.

Deborah Cushing

EMPLOYMENT STANDARDS ACT PROVISIONS ENFORCEABLE IN A CIVIL ACTION

A recent decision of the B.C. Supreme Court has addressed the enforcement of *Employment Standards Act* ("ESA") provisions through a civil action instead of through the employment standards complaint process. *In Macaraeg v. E Care Contact Centers Ltd.*, Madam Justice Wedge ruled that mandatory minimum provisions of the ESA may be implied terms of an employment contract and an employee may enforce those terms through a civil action for breach of contract.

The Facts

The plaintiff, Cori Macaraeg ("Macaraeg"), was hired to work as a Customer Service Representative by E Care Contact Centers Ltd. ("E Care"), a payday loan company. Macaraeg signed an offer of employment which set out her salary and benefits but which was silent on overtime pay. According to Macaraeg, she routinely

worked 12 hours on weekdays and eight hours on Saturdays but was told by E Care that the company did not pay overtime rates for extended hours. E Care acknowledged that it did not have a practice of paying overtime rates and never agreed to pay overtime. Macaraeg's employment was terminated without cause after 30 months of employment and she was given two weeks pay in lieu of notice. She brought an action for wrongful dismissal claiming damages in lieu of notice (including overtime for the notice period) and payment for the overtime hours she worked during her employment with E Care.

E Care brought a preliminary application seeking a ruling on two questions of law.

The Decision

(1) Are statutory employment rights implied terms of employment contracts?

Wedge J. summarized the jurisprudence from the Supreme Court of Canada and a number of provinces on the effect of statutory employment rights on contracts of employment as follows:

Terms of an employment contract failing to meet minimum statutory requirements will be replaced by either the common law or statutory requirement, whichever is more generous to the employee. Where no right exists at common law, the void provisions will be replaced by the statutory requirements.

The judge found that, "the effect of a minimum benefit conferred by employment standards legislation is to introduce a further contractual term into the contract of employment as effectively as if it had been included by agreement of the parties." The mandatory minimum requirements of the ESA for overtime benefits provided in ss. 35(1) and 40 of the ESA were held to be implied terms of Macaraeg's employment contract.

(2) Are the implied terms of the employment contract enforceable in a civil action for breach of contract?

The Court concluded that no provision in the current ESA precludes an employee from bringing a civil action to recover minimum statutory employment benefits. In particular, the Act contains no exclusive jurisdiction clause.

The Court found that the ESA does not "expressly or impliedly prohibit an employee from commencing civil proceedings to enforce his or her statutory rights, whether or not the claim is part of a wrongful dismissal action." The court distinguished cases where the cause of action was

founded directly upon breach of a statute. In this instance, although the terms of the contract arose from the standards fixed by that statute, the claim itself was a claim for breach of the employment contract.

In reaching its decision, the court departed from the judgment of the B.C. Supreme Court in *Sitka Forest Products Ltd. v. Andrew*, [1988] B.C.J. No. 2069.

In summary, Wedge J. concluded that:

1. The employment contract between E Care and Macaraeg included an implied term that she would be paid overtime compensation in accordance with the mandatory requirements of the ESA.

2. The ESA does not preclude Macaraeg from pursuing her claim for overtime pay in a civil action for breach of her employment contract.

Impact on Employers

According to this decision, the mandatory minimum requirements of the ESA, particularly overtime, will be implied into an employment contract regardless of the parties' subjective intentions, if the employee is not excluded from the application of the ESA or its provisions on hours of work.

Most significantly, the decision permits civil actions to enforce claims for ESA benefits. Under the ESA, claims must be filed within 6 months of the date of termination of employment or contravention of the Act and the employer's liability for wages is limited to six months. In contrast, in a civil action, the time limit for bringing a claim is set by the *Limitations Act* (six years for breach of contract) and the award of damages could thus extend to the entire term of the employment relationship.

Macaraeg v. E Care Contact Centers Ltd., [2006] B.C.J. No. 3211 (S.C.).

Deborah Cushing

COLLECTIVE AGREEMENTS AND THE DUTY TO ACCOMMODATE

This recent decision of the Supreme Court of Canada deals with the interaction between labour law and the right of a person to be absent from work due to an illness or disability. The issue before the Court was the role of the collective agreement in the assessment of an employer's duty to accommodate an employee absent from work because of personal health problems.

The collective agreement at issue provided that after a three-year absence an employee was deemed

dismissed. The arbitrator in the first instance found that undue hardship was made out by the employer because an employer does not have a duty to retain employees who are incapable of performing their duties. The Quebec Court of Appeal concluded that the arbitrator did not assess the reasonable accommodation issue on an individualized basis but instead applied the collective agreement mechanically.

The appellant-hospital submitted that it was open to an employer and a union to agree, in their collective agreement, to the scope of the duty to accommodate and thus provide for a maximum period of time beyond which any absence would constitute undue hardship for the employer.

Deschamps J. (on behalf of six members of the Court) noted that the parties to a contract cannot agree to limit a person's fundamental rights; however, she noted that a clause meeting the minimum employment standards as set out by provincial legislation is not, in and of itself, suspect. She also confirmed that "the importance of the individualized nature of the accommodation process cannot be minimized."

After reviewing the case law Deschamps J. concluded that while a clause in a collective agreement is not determinative, it is a significant factor to be taken into account by the arbitrator in any dispute. Deschamps J. also confirmed that an employee must facilitate the accommodation process and found that the grievor in this case did not do so. She noted that "…if [the grievor] felt that she would be able to return to work within a reasonable period of time, she had to provide the arbitrator with evidence on the basis of which he could find in her favour."

Abella J. wrote a concurring opinion on behalf of herself and two other members of the Court. She concluded that the grievor had not made out a case of *prima facie* discrimination. Abella J. stated she could not "accept the conclusions of the majority that "automatic" termination clauses automatically represent *prima facie* discrimination".

She found that clauses such as the one found in the collective agreement at issue, providing that after 36 months absence an employee would be terminated, were not discriminatory and if found to be so, would remove the incentive to negotiate mutually acceptable absences. In Abella J.'s view the claimant did not establish *prima facie* discrimination and therefore the employer was not called upon to justify the standard it had set in the collective agreement, or the steps that it had taken.

Employers would be well advised to attempt to negotiate clauses providing

for termination of employment after an employee has been absent for medical reasons for a defined reasonable period of time.

McGill University Health Care (Montreal General Hospital) v. Syndicate Des Employes de L'Hopital General du Montreal, 2007 SCC 4

Nick Ellegood

JOINT BRITISH COLUMBIA-ALBERTA AGREEMENT

On April 28, 2006 B.C. and Alberta signed the British Columbia-Alberta Trade Investment and Labour Mobility Agreement ("TILMA") at a joint B.C.-Alberta Cabinet meeting held in Edmonton, Alberta.

Under TILMA, B.C. and Alberta businesses and workers will enjoy new market access. For example, it will streamline business registration and on-going reporting requirements so that businesses registered in one province are automatically recognized in the other. More importantly, for human resource practitioners, it will enhance labour mobility by recognizing occupational certification of workers in both provinces. Currently, workers in many occupations face additional exams and training requirements if they want to work outside their home province.

Under TILMA, workers who are certified for a given occupation in one province will be recognized as being qualified in both provinces. Workers will still be required to register with the regulatory authority for that occupation. However, they will not be required to undergo significant additional examinations or training.

To date, B.C. and Alberta have identified more than 60 occupations with different standards that limit labour mobility between the two provinces. The governments of B.C. and Alberta intend to work with occupational regulators to reconcile the standards by April 1, 2009. The agreement also covers internationally trained professionals. If a professional has been licensed in Alberta, that professional will also be able to be licensed in B.C. and vice versa.

While TILMA was signed in April 2006, it has a transition period to April 2009 before it comes into full effect. This will allow the governments of B.C. and Alberta to make any required regulatory changes in order to effect conformity with the other province. Further information on TILMA is found at the Ministry of Economic Development, Government of B.C. website at www.ecdev.gov.bc.ca.

M.J. (Peggy) O'Brien

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