HRPAO
Human Resources Professionals Association of Ontario
Human Resources Professionals Association of Durham
Resource
shaping organizational excellence
www.hrpad.org
April 2008

Revamping The Canada Labour Code

In the February 2005 Management Counsel newsletter, we reported that Harry Arthurs, former dean of Osgoode Hall Law School, had been appointed by the federal Minister of Labour to conduct a review of the provisions of Part III of the Canada Labour Code (the "Code"). The Code governs employees who are under federal jurisdiction, including inter-provincial trucking, banking, aviation, rail, shipping, telephone, cable, broadcasting, nuclear and postal services. Approximately 840,000 employees across Canada are governed by the Code. Part III of the Code is principally directed to establishing minimum employment standards intended for the protection of employees. With certain exceptions, Part III covers both unionized and non-unionized employees.

While the Code has been revised in piecemeal fashion since its enactment in 1965, it has never been subject to a comprehensive revision.

The Arthurs Commission released its 324 page report in the fall of 2006. The Commission made many recommendations for revisions to the Code. Some of the recommendations are summarized below.

Expansion of Those Covered Under the Code

At present, only individuals who are legally considered to be "employees" are covered by the Code, and therefore, "independent contractors" are not covered. It can be very difficult to distinguish whether a worker is an independent contractor or an employee. In general terms, employees tend to have less control over their work, and independent contractors more. But these are generalizations. The Commission was concerned that many independent contractors are vulnerable, yet enjoy no statutory protection. The Commission's recommendations include:

Defining an additional class of workers, which it calls "autonomous workers".

"Autonomous workers" would occupy some of the space which previously fell within the concept of independent contractor.

The definition of "autonomous worker" be related to specific employment sectors.

Autonomous workers would not receive the full array of rights possessed by employees, but would have a more limited package of rights.

The process of defining autonomous workers and what rights they will have, would first require consultation with the affected industries.

Any worker who is considered to be an independent contractor, or autonomous worker, would have to be advised by the hiring company in writing, or would be presumed to be an employee. The written notice would not be determinative, and the true substance of the relationship could override any written notice that was at odds with the facts.

Hours of Work and Overtime

No recommendations were made to change the status quo of 8 hour days, 40 hour weeks and a maximum of 48 hours per week. This includes maintaining the exemption whereby managers are not subject to specific limitations on working hours and are not entitled to overtime pay. The Commission's recommendations include:

- An explicit stipulation that managers were not to be permitted to work hours which endangered their health.
- Further study be given to adjustments to overtime and working hours rules which might be appropriate on a sectoral basis.
- Current procedural requirements to obtain Ministerial permits for increased maximum work hours be streamlined.
- Increased flexibility in the calculation of overtime (similar to some provincial regulations).

Paid time off in lieu of overtime pay.

Broadening the definition of emergency situations where hours of work may exceed the usual maximums.

Expansion of Leave Entitlement

Eight provinces make some provision for leave related to family responsibilities, but no provisions are currently in the Code. The commission recommends that 10 days per year be permitted for "family responsibility" leave.

The current bereavement leave provisions permit three paid days, which must be taken immediately after a death. The Commission's recommendations include:

- Increased flexibility and duration of bereavement leave to seven consecutive days, the first three paid, and the last four unpaid.
- Improving the current sick leave provisions to permit leave to continue up to the full period of EI benefits eligibility.
- Entitling employees with periods of service too short to be eligible for maternity/parental/sickness leave under current Code provisions, but who qualify for EI benefits, to claim leave.
- Compassionate care leave be permitted for any serious illness, and not restricted to imminent death situations.

Currently, employees who are required to be absent from work in order to attend court, enjoy no protection of their employment. The Commission's recommendations include:

Permitting leave for employees required to be in court as jurors, witnesses or parties.

Provisions which would protect certain classes of employees' positions during declared public emergencies, such as a pandemic.

Termination of Employment and Statutory Severance Pay Enhancements

The Commission recommends increasing the amount payable for statutory severance pay from two to three days per year, for employees with more than 10 years continuous service (while maintaining existing provisions for termination pay). Compensation is still substantially more generous for most employees regulated by Ontario employment legislation.

The Code, in contrast to most other provinces, provides employees in certain types of terminations, with rights similar to unionized employees, to challenge the decision to terminate their employment, and to claim reinstatement ("Unjust Dismissal"). On average, 1,400 employees per year make Unjust Dismissal claims. The Commission's recommendations include:

Specialized, permanently appointed hearing officers replace the current system of appointing adjudicators on an ad hoc basis. It also proposes that Unjust Dismissal complaints, which often proceed slowly, be prioritized.

A new position, Director of Application Services ("DAS") be established, in order to increase overall efficiency of complaints processed under the Code.

DAS be empowered to summarily dismiss unjust dismissal claims which on their face are frivolous and vexatious.

Workplace Bullying

Public awareness of the issue of workplace bullying or general workplace harassment has been steadily on the increase over recent

years. However, with the exception of Quebec, victims of harassment or abuse have no specific statutory protection. The Arthurs Commission does not see this problem as an appropriate area to address within Part III of the Code. The Commission did look to Part II of the Code, which deals with occupational health and safety standards. The Commission's recommendations include:

- Part II of the Code be amended to include a definition for workplace abuse, harassment or bullying.
- Part II of the Code be further amended to establish procedures for preventing workplace harassment.

The Problem of Multiple Proceedings

At present, the Code provides protection against sexual harassment, augmenting jurisdiction which also resides under the Canada Human Rights Act. Employees who file complaints, sometimes pursue claims in more than one forum. For example, an employee may file an unjust dismissal claim and proceed to file a complaint with the Canada Human Rights Commission ("CHRC") in respect of the same facts. This is highly inefficient, and increases costs and expenditure of time for all involved. The Commission had no solution which would eliminate this problem altogether. The Commission did recommend:

- The CHRC and others in government jointly discuss the possibility of expanding the jurisdiction.
- A process be established for consultation between tribunals such as the CHRC and the DAS.
- The power for a matter to be transferred from the DAS to the CHRC, or from the CHRC to the DAS, if it appears that a complaint would be more appropriately dealt with by such a transfer.

Current Status of Arthurs Report

The Arthurs Report was only recently released, and it is difficult to say what will become of its many recommendations, only some of which are reflected above. A report from a commission such as the Arthurs Report is a first step in the process of law reform. The report contains recommendations only, and it is up to Parliament whether to adopt any or all of them. As well, because some of the recommendations are very general and require further industry consultation to clarify their scope, it may be some time before a bill adopting any of the recommendations is tabled.

Employers that are governed by federal legislation may wish to participate in further

consultations in order to ensure that any changes to the law which are incorporated into a bill have taken into account their concerns. Concerned employers should contact their industry associations or Sherrard Kuzz LLP to see what input is being made in response to the Arthurs Report.

We will keep you posted in our newsletter if and when further developments occur.

Reprinted with permission from Sherrard Kuzz, LLP,
Authored by Tom Gorsky