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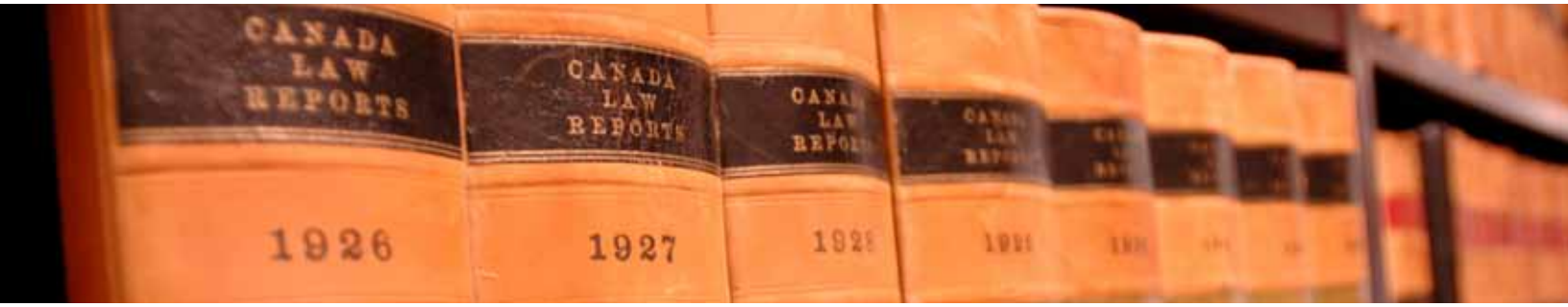
Labour & Employment News



MCKERCHER LLP BARRISTERS & SOLICITORS

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AMENDMENTS TO *THE WORKERS' COMPENSATION ACT* TO RECOGNIZE PSYCHOLOGICAL INJURY

The Saskatchewan Workers' Compensation Board is a provincial agency that delivers workplace insurance to Saskatchewan employers and benefits to Saskatchewan workers when they are hurt at work. The WCB is governed by *The Workers' Compensation Act, 2013*.

On December 20, 2016, an amendment was made to *The Workers' Compensation Act, 2013*, and Bill 39 became law. Bill 39 establishes a rebuttable presumption for all forms of psychological injuries, meaning that if a worker has experienced a traumatic event or a number of events in the course of their work and has been diagnosed as having a psychological injury, it is presumed that the injury is the result of their employment. In other words, the worker is given the benefit of the doubt. Previously, workers had to provide additional proof that their psychological injury was work-related.

Bill 39 is applicable to all forms of psychological injury that workers could suffer on the job. Saskatchewan is the first jurisdiction to establish this presumption for all forms of psychological injury incurred through work, as opposed to just post-traumatic stress disorder.

Bill 39 is retroactive and will cover injuries that occurred prior to the date of the Bill's Proclamation. If an injured worker's claim for psychological injury was denied previously, they can now seek reconsideration under the new legislation. A diagnosis from a psychiatrist or psychologist that includes confirmation that the injury occurred as a result of being exposed to a traumatic event at work must be provided when applying for compensation.

Employers should also be aware that employees are barred from pursuing a lawsuit or grievance seeking compensation for a psychological injury in the workplace, as employees are limited to seeking workers compensation for injuries in the workplace: *University of Saskatchewan v Workers' Compensation Board* 2009 SKCA 17.

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RISING MINIMUM WAGE IN SASKATCHEWAN

On October 1, 2017, the minimum wage in Saskatchewan will increase by 24 cents – to $10.96 from $10.72.

After the increase, Saskatchewan's minimum wage will be the second-lowest in the country, after Nova Scotia.

In comparison, Alberta and Ontario have announced plans to increase provincial minimum wages to $15 an hour by October 2018 and January 2019 respectively.

SASKATCHEWAN COURT CONSIDERS CONTRACTING OUT LIMITATIONS *(AGRIUM VANSCOY POTASH OPERATIONS V USW 7552*, 2017 SKQB 143, 2017 CARSWELLSASK 254)

Even where employers have contracting out rights in a collective agreement, they can still run into trouble when the contracted services are identical to the work of bargaining unit employees and are carried out side by side with bargaining unit employees. This was the issue in *Agrium Vanscoy Potash Operations v USW 7552*. An arbitrator found that the Employer in that case breached the collective bargaining agreement between it and the Union by contracting with an outside company. The Employer argued that the Collective Bargaining Agreement (CBA) permitted it to operate and manage the business, subject only to express restrictions in the CBA, and that the CBA permitted the hiring of independent contractors to work at the operation if the Employer deemed it necessary or desirable. The Union alleged that the contract with the third party was not a contract with an independent contractor as defined in the CBA, but instead was a situation where non-bargaining unit personnel were brought in to work alongside bargaining unit employees. In coming to a conclusion, the arbitrator considered numerous facts, including: that the work was performed in exactly the same manner as if the bargaining members were performing it, the outside company's employees required training from a bargaining unit employee, the outside company's employees used all of the employer's tools and equipment, they worked on the same schedule as the bargaining unit employees, and they did not bring to bear on the work performed any expertise that the members of the bargaining unit did not possess. The arbitrator accepted the Union's arguments. The Employer applied for judicial review. The Court dismissed the application, determining that the arbitrator was correct in concluding that the outside company and its employees were not functioning as an independent contractor.

SUPREME COURT UPHOLDS TERMINATION FOR BREACH OF DRUGS AND ALCOHOL POLICY *(STEWART V ELK VALLEY COAL CORP.*, 2017 SCC 30)

In *Stewart v Elk Valley Coal Corp.* the complainant was dismissed under a drugs and alcohol policy that required employees to disclose dependence or addiction issues before any drug-related incident occurred. Failure to do so would be cause for termination if the employee was involved in an accident and tested positive for drugs. After the complainant's loader was involved in an accident, he tested positive for drugs. Following his dismissal, he brought a human rights complaint alleging the employer discriminated against him on the basis of an addiction disability.

The employer took the position that the dismissal was for just cause as the complainant had breached the policy. It was submitted that had the complainant disclosed his addiction prior to the accident he would have been offered treatment, but that the nature of working in a mine warrants stricter penalties in order to maintain a safe worksite. The Tribunal confirmed this position.

The Supreme Court of Canada affirmed the Tribunal's conclusions, holding that the employer dismissed the complainant for breach of its policy, that addiction was not a factor in the termination, and that *prima facie* discrimination was not established. The argument that denial prevented the complainant from disclosing his addiction prior to the accident was rejected. It was determined that even if the complainant had been in denial about his addiction, he knew he should not take drugs before working and had the ability to decide not to take them as well as the capacity to disclose his drug use to his employer. It could not be assumed that the complainant's addiction diminished his ability to comply with the terms of the policy.

This case signals that the courts are prepared to limit the duty to accommodate, particularly in safety sensitive workplaces. It suggests that employers can rely on the provisions of drug and alcohol policies. It is important to note that the case only addressed one aspect of the specific drug and alcohol policy used by that employer. There are many other aspects of such policies that raise potential human rights issues. Legal advice should be sought before adopting and applying a drug and alcohol policy in the workplace.

Thank you to McKercher LLP, summer student, Morgan Boutin, for her assistance in compiling the articles for this newsletter.

Employment & Labour Law

Our Firm actively advises clients on labour-related matters and routinely represents clients in appearances before the courts, the Labour Relations Board and various arbitration and human rights tribunals. We represent both Federally and Provincially regulated clientele.

Our experience covers all aspects of labour and employment law, including unjust dismissal disputes, collective bargaining disputes and human rights complaints.

Our lawyers are experienced in advising workplaces regarding the rights and duties of all parties as set out by the occupational health and safety regulations as well as advising on the federal or provincial labour codes that are applicable depending on the sector involved.

We have experience across many industries from construction and non-profit to educational institutions and national retail outlets.

EXPERIENCE IN:

- Collective Bargaining Issues
- Labour Disputes
- Grievance Arbitration
- Termination Disputes
- Human Rights Issues
- Occupational Health and Safety
- Pension Law

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McKercher LLP enjoys a reputation for integrity, experience and innovation. Our lawyers, collectively and individually, strive to preserve and promote that reputation, committing themselves and their considerable talents to meeting the complex needs of local, provincial, national and international clients.

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