Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers

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BREAKFAST SEMINAR SERIES

YEAR END WRAP UP:
A Review of Legislative, Labour and Employment Law Developments in 2007

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Session Overview

- Legislative Changes
  - Family Day – Are employers required to recognize it?
  - Questioning the scope of HR Professionals' duties – Impact of Bill 14
- Employment Law Update
  - Changing employment contracts – Is reasonable notice sufficient? Or is fresh consideration required?
  - Enforceability of release agreements
  - Class actions – an emerging threat for employers
- Labour Law Update
  - Accommodation update
  - Right to bargain – A new constitutional right?

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Legislative Update

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A New Statutory Holiday for Ontario

- Family Day, 3rd Monday in February
  - O. Reg. 547/07 filed by government on October 12, 2007
  - 9th public holiday under the *Employment Standards Act*
  - Beginning in 2008
  - 1st addition of a public holiday since Boxing Day was added in 1989
  - Applies to provincially-regulated employers
    - Specific exemptions
- Issue: Are employers required to recognize the new holiday?

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Family Day – Are Employers Required to Recognize the New Holiday?

- ESA is the minimum standard for all Ontario employees (unionized and non-unionized)
- Employer's cannot contract out of the Act (s. 5(1))
- Exception to this rule – greater right or benefit (s. 5(2))
- Employer's have to demonstrate collective agreement, employment contract or policy provides a greater benefit in respect of public holidays than does the ESA

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Family Day – Are Employers Required to Recognize it?

- Must not compare solely the number of paid holidays
- Must consider total public holiday package and not compare each individual item
  - *Queen's University v. Fraser et al.* (Ont. Div. Ct.)
    - Metaphorical scale
  - Compare apples to apples
  - Arbitral case law from when Boxing Day was introduced

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What Arbitrators/Adjudicators Have Considered

- Number of holidays
- Qualifying conditions for entitlement to a paid holiday
  - i.e. length of service, working day before and day after the paid holiday
  - ESA - "Last and first" rule only
- Rate of payment for working on a paid holiday
- Whether floating holidays should be counted as part of the comparison
  - Subject of some arbitral debate
  - Considered more stringent conditions placed on use of floats (i.e. entitlement is lost if not used before end of the year, requirement they be mutually agreed)

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Family Day – Are Employers Required to Recognize it?

- Considerations:
  - Should employers raise the issue at bargaining?
  - Substitution of a floating holiday or another holiday
  - Does your agreement/policy/contract provide for the express recognition of any other day prescribed?

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Bill 14 – Impact on HR Professionals

- Bill 14 – *Access to Justice Act*
  - In force May 1, 2007
  - Amended *Law Society Act* for regulation of persons who "provide legal services"
  - Paralegal licensing requirements
  - Some HR professionals activities may be viewed as providing legal services and subject to new paralegals licensing regime (i.e. appearing before tribunals)

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Bill 14 – Impact on HR Professionals

- "A person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person."
- *Law Society Act*, s. 1(5)

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Exemptions from Licensing Requirements

- Persons deemed not to be practising law or providing legal services
  - A person who is acting in the normal course of carrying on a profession or occupation governed by another Act that regulates specifically the activities of persons engaged in that profession or occupation (*Law Society Act*, s. 1(8))
  - Members of the HRPAO
    - Law Society Revised Licensing By-Law (Issued September 20, 2007)
    - Exemption categories to be reviewed in two years

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What is Required of HR Professionals

- A member in good standing of HRPAO
- In compliance with HRPAO Code of Ethics
- Acting in normal course of activity of HR professional
- Profession or occupation is neither the provision of legal services nor the practice of law
- Providing legal services only occasionally and only ancillary to your employment as an HR professional
  - i.e. not more than 30 hours per week

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Impact on HR Professionals Who are Not Members of the HRPAO

- Providing legal services
- Licensing and exam requirements

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Employment Law Update

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Changing Employment Contracts

- Can employment contracts be changed unilaterally on reasonable notice?
- Is fresh consideration required?
  - Something of value

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Wronko v. *Western Inventory Service Ltd.* (Ont. S.C.J. – 2006)

- Senior management employee refused to sign an amended employment agreement which contained a significant change to the termination provision
  - Previous provision – 2 years' salary + bonus
  - New provision – 3 weeks/service to a maximum of 30 weeks
- Employer provided 2 years' notice of the change

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Wronko v. *Western Inventory Service Ltd.* (Ont. S.C.J. – 2006)

- Wronko refused to accept change as it was without his agreement and without any consideration
- When 2 years ran out, Wronko was told to accept the revised contract or there was no job for him
- Wronko claimed damages for wrongful dismissal

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Wronko v. *Western Inventory Service Ltd.* (Ont. S.C.J. – 2006)

- Court found:
  - Change being made was fundamental
  - Employer had the right to vary the termination clause on reasonable notice to the employee
  - "a fundamental change that is accompanied by reasonable notice is not constructive dismissal"
- Appeal to be heard on March 10, 2008 (Court of Appeal)

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Notice of Change

- Amount of notice required is dependent on
  - terms of the employee's employment contract,
  - age,
  - length of service, and
  - character of employment
- If change is fundamental - same as notice to terminate an employee

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Enforceability of Release Agreements
Titus v. *William F. Cooke* (2007 – Ont. C.A.)

- Titus, In-house Legal Counsel
- Terminated due to business downsizing after 18 months employment
- Offered settlement package, provided he signed a release
  - for 3 months' salary in lieu of notice plus a letter of reference in exchange for releasing employer from all claims. If Titus did not sign, employer would only offer the statutory minimum of 2 weeks' termination pay

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Enforceability of Release Agreements
Titus v. *William F. Cooke* (2007 – Ont. C.A.)

- Titus accepted the offer and signed the release on the spot
- Obtained new employment within 2 weeks
- He later sued the employer, claiming settlement and release were unconscionable
- Titus was successful at trial and awarded 10 months' reasonable notice
- Employer appealed

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Enforceability of Release Agreements
Titus v. William F. Cooke (2007 – Ont. C.A.)

- Court allowed employer's appeal
- Trial judge did not respond to Titus' claim in respect of unconscionability, but had instead erroneously applied the law of bad faith dismissal
- Court noted four necessary elements for unconscionability
  - Grossly unfair and improvident transaction
  - Lack of independent legal advice or other suitable advice
  - Overwhelming imbalance of bargaining power
  - Other party's knowingly taking advantage of this vulnerability

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Titus - Grossly unfair and improvident transaction

- Offer of 3 months' salary was not grossly unfair
- Linking letter of reference to acceptance of the settlement offer was potentially problematic
  - "Threat to withhold a letter of reference by the employer as part of a negotiation/litigation strategy may, in some situations, provide valuable support for an employee's claim that a release was unconscionable and should not be enforced."
  - Reference letter played a very small part in the negotiation over the release. Titus did not negotiate on this and did not request a letter
- Linking settlement offer to release was not grossly unfair

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Titus - Lack of independent legal advice or other suitable advice

- Factor inapplicable in this case
- Titus was a senior lawyer with extensive experience in contract and employment law
  - Did not need or want legal or other advice

Titus - Overwhelming imbalance in bargaining power

- Titus argued that death of father 3 weeks before termination and high debt had made him vulnerable to being pressured into signing the release
- Vulnerability diminished by fact Titus was a senior, knowledgeable lawyer
- Titus knew his position and his options (accept, reject, negotiate)

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Titus - Employer taking advantage of employee's vulnerability

- Employer sought legal advice about appropriate severance package
- Contents of package were not unreasonable
- Termination was announced and severance package presented in private in a polite, professional manner
- Employer strongly advised Titus to take time to consider the offer
- Employer complied with Titus' request for immediate payment

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Making the Release Effective

- Language should be clear, unequivocal
- Consideration
  - Employee's severance must exceed employment standards minimum
- Employees should not be pressured into signing a release
- Allow employees adequate time to review release and consider their options, obtain independent legal advice
  - Include a clause that this was done
- Exercise caution when terminating employees during sensitive times

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Class Actions – An Emerging Threat For Employers

- Two recent class actions – CIBC and KPMG
- Claiming millions in unpaid overtime on behalf of current and former employees
- Both must be certified by court
- Importance of observing the requirements of employment standards legislation – hours of work and overtime thresholds, exemptions
  - *Employment Standards Act*
  - *Canada Labour Code*
- Failure to respect overtime rules risks complex and expensive litigation and potentially hefty damage awards for unpaid overtime

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Labour Law Update

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Accommodation Update

- Does the duty to accommodate a disabled employee require the employer to provide modifications to the employee's body or is it entitled to limit its accommodation to modifications to the employee's workplace and/or job?
- *Toronto District School Board and ETFO* (2007 – P.C. Picher)

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Toronto District School Board (2007 – P.C. Picher) The Facts

- Teacher alleged School Board failed in its duty to accommodate by declining to provide her with digital hearing aids necessary to overcome her congenital hearing disability
- Union argued digital hearing aids necessary for performance of grievor's duties as a teacher. Would not represent an undue hardship
- Extended health plan provided a lifetime hearing aid benefit of $400.00, which grievor had previously received

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Toronto District School Board (2007 – P.C. Picher) The Award

Board found:

- *Meiorin* and 3-step test is not intended to apply to an employer's policies respecting the appropriate form of accommodation
  - Standards addressed in *Meiorin* are standards governing the performance of work, not policies respecting the accommodation of disabled employees
- If *Meiorin* did apply, School Board's stance against supplying personal bodily assistive devices as a means of accommodation is not discriminatory

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Toronto District School Board (2007 – P.C. Picher) The Award

- Responsibility of employer in meeting its duty to accommodate to the point of undue hardship is properly focused on the workplace and not on the employee's person
- Providing personal bodily assistive devices is not a job-related obligation which goes to the duty to accommodate
- Union's argument confused issue of personal adjustment to a disability with issues of workplace adjustment

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Toronto District School Board (2007 – P.C. Picher) The Award

- *"It is for the disabled employee to choose whether to use medications, prosthetic devices, or assistive devices, such as crutches, a wheelchair, hearing aids and the like, to perform life's functions. Those decisions are life related, not work related. Those decisions may impact a person's ability to work, with or without accommodation, but they are not decisions that involve the employer."*

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Toronto District School Board (2007 – P.C. Picher) The Award

- School Board did not fail in its duty to accommodate the grievor by virtue of declining to provide her with the personal bodily assistive devices of digital hearing aids
- However, School Board did not consider the need for accommodation and possible means to accomplish it within the limits of undue hardship
  - Parties directed to meet and discuss
  - While not responsible to supply grievor with digital hearing aids, recommended that School Board facilitate grievor's purchase through the arrangement of favourable financing and a reasonable repayment schedule

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Right to Bargain – A New Constitutional Right

- *Health Services v. British Columbia* (2007 – S.C.C.)
- S.C.C. overruled 20 years of its own jurisprudence
  - Court had held that the right to free association guaranteed by the Charter was limited, in the labour relations context, to the right to individuals to join trade unions
- Procedural right of collective bargaining is protected by the *Charter*
  - Extended the constitutional protections to a significant range of collectively-exercised rights

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B.C. Health Services Decision (2007 – S.C.C.)

- B.C. government introduced legislation to reorganize health care
- Introduced with only minimal consultations with affected unions
- Legislation gave employers greater flexibility to organize their relations with their employees as they saw fit, in ways that would not be permissible under existing collective agreements
  - Changes to transfers and multi-worksite assignment rights
  - Contracting out
  - Status of employees under contracting out arrangements
  - Layoffs and bumping rights
- Unions challenged the legislation

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B.C. Health Services Decision (2007 – S.C.C.)

- Provisions of legislation dealing with contracting out, layoffs and bumping constituted a significant interference with the right to bargain collectively and therefore violated the *Charter*
- Court suspended the effect of its ruling for 12 months to allow provincial government to determine how to address the impact of the decision

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Impact of Constitutionalizing Collective Bargaining

- Significant impact, extent of impact remains to be seen
- Some potential challenges:
  - Exclusion of particular groups of employees from labour relations statutes
  - Imposition of back-to-work legislation, accompanied by binding interest arbitration
  - Restrictions on bargaining rights, right to strike
  - Collective bargaining statutes that limit collective bargaining and provide for binding interest arbitration (i.e. HLDAA, FPPA, PSA)
  - Will courts recognize a constitutionally-protected right to strike
- Ruling does not affect private sector employers and their actions vis-à-vis their unions (application of *Charter*)

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Questions?

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