BREAKFAST SEMINAR SERIES

LABOUR ARBITRATION UPDATE

You Can't Be Serious

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September 21, 2005

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Labour Arbitration Update

- Overview of recent decisions in Ontario and implications for unionized workplace
  - Developments in award of damages by arbitrators
  - Employer liability for negligent administration of benefits
  - Ontario Health Premium – Who pays?
  - Injunctions prohibiting employer actions
  - Employee misconduct and progressive dismissal
  - ESA severance provision ruled unconstitutional
  - Emergency leave provisions of ESA

Developments in Award of Damages by Arbitrators

- Impact of S.C.C.'s decisions in *Weber* and *Parry Sound*
- Labour arbitrators
  - exclusive jurisdiction to hear all matters arising under the collective agreement (s. 48(1) of *LRA*)
  - power to interpret and apply human rights and other employment-related statutes (s. 48(12)(j) of *LRA*)
- Expanded jurisdiction and broadened remedial powers

Tort Remedy at Labour Arbitration
Aggravated and Punitive Damages

- ***OPSEU v. Seneca College*** (November 2004 – Ont. Div. Ct.)
- Professor dismissed from Seneca College
- Allegedly sent anti-Semitic materials to college administrator via inter-office mail
- Only evidence was handwriting on routinely used inter-departmental envelopes
- Professor strenuously denied sending materials
- No action taken for nearly 8 years after offending material was sent

Tort Remedy at Labour Arbitration

Aggravated and Punitive Damages

- Arbitration Board reinstated professor with full compensation
- Arbitration Board declined jurisdiction to hear union's claim for punitive and aggravated damages
- Court ruled that arbitrators have jurisdiction to award aggravated and punitive damages
  - Claim for aggravated and punitive damages were "remedial loose threads" not independent claims which arbitrator left hanging

Tort Remedy at Labour Arbitration

Aggravated and Punitive Damages

- Arbitrators, broad remedial power includes right to award damages
- Matters which arise directly or indirectly out of collective agreement must be arbitrated
- Arbitrators do not need explicit provision in collective agreement to decide on punitive or aggravated damages
- Grievance did not involve distinct tort claim → issue of damages arose from manner of termination
- 8 year delay in imposing discipline prejudicial to professor's ability to defend

Aggravated and Punitive Damages
Implications

- Awarding of damages is rare
- However, extent of impact of Seneca College decision remains to be seen
  - Leave to appeal to Court of Appeal granted March 18, 2005
- May increase grievances claiming aggravated or punitive damages
- Impact on settlement discussions
- Expansion of tort liability into grievance arbitration process

Damages – Workplace Harassment

- ***Toronto Transit Commission v. ATU*** (2004 – Shime)
- Arbitrator awarded grievor $25,000 in general damages to be paid by grievor's supervisor and TTC
- Arbitrator concluded grievor's supervisor had abused his authority and harassed the grievor - TTC continually failed to investigate and rectify the "poisonous work environment"

Damages – Workplace Harassment

- Even in absence of an express provision of the collective agreement with respect to abuse and/or harassment, arbitrator found it was an implied term of the collective agreement that the work of a supervisor must be exercised in a non-abusive, non-harassing manner
- Workplace harassment was inconsistent with employer's obligation to provide safe working environment under the OHSA

Damages – Workplace Harassment

- Arbitrators generally reluctant to make significant awards of damages against employers and/or supervisors
- Where arbitrators have awarded damages for workplace harassment, amounts have been fairly nominal
- Harassment grievance arbitrable even where no alleged breach of the collective agreement
  - *Parry Sound* (S.C.C.)

Damages – Failure to Consult

- ***West Park Healthcare Centre and SEIU*** **(**2005 – Charney)
- Arbitrator awarded $16,000 in damages for Hospital's failure to consult with union on restructuring plans

Damages – Failure to Consult
Implications

- Many collective agreements contain language requiring some form of consultation or discussion with the union in the event of restructuring
- Such provisions viewed as substantive right
- Review collective agreement language
- Traditional remedy for breach is declaration
- Risk for damages – deliberately ignoring union in face of clear language

Administration of Benefits

- ***Perlett Estate v. Riverside Health Care Facilities Inc.*** (2005 – Ont. C.A.)
- Court of Appeal granted judgment against deceased employee's former employer for failure to advise of enhanced life insurance benefits
- Union commenced a grievance
- Employer – grievance not arbitrable
  - Policy did not form part of collective agreement nor did collective agreement set out terms of administration
  - Only obligation was to pay a percentage of premium

Administration of Benefits

- Estate sued employer and insurer in court – tort action
- Employer negligently administrated the group life insurance plan
- Trial judge found that employer owed its employees a duty of care to advise them about group insurance and to administer group benefit plans competently
- Citing *Weber*, trial judge dismissed action, matter governed by collective agreement

Administration of Benefits

- Estate appealed dismissal
- Court of Appeal interpreted the *Weber* principle and noted that the essential character of the dispute did not arise from the collective agreement
  - Essential character of dispute concerned the propriety of the employer's administration of the insurance plan – collective agreement was silent on this issue
- Employer found liable for $206,000 + interest – value of the enhanced life insurance benefits

Administration of Benefits

- Lessons for Employers:
  - Duty to ensure that employees are aware of all aspects of a group benefit programs
  - Employer can not leave administration of benefits strictly to insurer
  - Benefit provision in collective agreements will indicate the essential character of dispute - grievance arbitration or remedy in Court

Ontario Health Premium ("OHP")

- Introduced by Ontario government in 2004 provincial budget
- Before 1990 Ontarians paid health care premiums
- Many collective agreements negotiated prior to 1990 contained provisions requiring the employer to pay the cost of those premiums
  - Replaced by Employer Health Tax
- Despite change, some collective agreements retained the old language
- Introduction of OHP has re-ignited the issue in workplaces where such clauses where not deleted

Ontario Health Premium ("OHP")

- Unions filing grievances demanding employer pay cost of new OHP
- Approximately 20 arbitration awards issued to date
- Majority have found it to be a "tax" not a "premium"
  - OHP is an individual "total" income tax imposed on employees pursuant to the *Income Tax Act*
  - No statutory link between OHIP and OHP
  - Non-payment does not result in denial of services

Ontario Health Premium ("OHP")

- A minority of decisions have indicated that it was an employer obligation
- Have hinged on wording of the provision, specifically the words "cost" and "contributions"
- A few others have failed to properly apply and interpret the applicable legislation

Ontario Health Premium ("OHP")

- Lessons for Employers:
  - Be aware that Unions may commence a grievance over payment
  - Examine collective agreement language – liability depends on the language
  - Note that Unions may attempt to negotiate payment of the OHP in the next round of bargaining
- Issue still undecided – approximately 9 decisions referred to judicial review

Employer Prevented from Unilateral Schedule Changes Pending Arbitration

- ***Aranas v. Toronto East General*** (2005 – Ont. S.C.J.)
- Union grieved implementation of a "Master Rotating Schedule" and its elimination of permanent schedules in one of its units
- Grievors had sought permanent evening and nights – hired on that basis due to family obligations
- Collective agreement provided for permanent shift schedules – 30 year practice
- Hospital declined further delay of scheduling change pending expedited arbitration

Employer Prevented from Unilateral Schedule Changes Pending Arbitration

- Union sought injunction from Court prohibiting implementation of new schedules
- Court granted injunction – "no adequate alternative remedy existed"
- Applied three-part test
  - Serious issue to be tried
    - Union had a reasonable chance of success at arbitration
  - Irreparable harm
    - "young children's lives could be drastically and irreparably affected for a substantial period of time". Could not be quantified in monetary terms or remedied adequately by arbitrator in final analysis
  - Balance of convenience
    - Employer had already agreed to one postponement, the harm to the grievors would outweigh Hospital's interest in moving forward with schedule changes

Employer Prevented from Unilateral Schedule Changes Pending Arbitration

- **Significance**
- Court's willingness to restrain management's right prior to arbitration
- Court's recognition of importance of employee's right to arrange work schedules in conjunction with family obligations
- Exception to well-known principle of "obey now, grieve later"
- Court's assessment of merit and jurisdiction depends on arbitrator's power to make an order retroactive to constitute an adequate alternative remedy

Toronto East General and ONA

(July 26, 2005 - Tacon)

- Arbitrator determined Hospital had authority, by virtue of the management's right clause, to determine shift schedules
- Decision to move to rotating shifts was "grounded on a rational connection between its decision and objectives"
- Collective agreement did grant right to bargaining unit members to request permanent shifts
- Request must be considered on an individual basis and granted "where feasible"
  - "Feasible" included reasons for request and impact on hospital's operations

Less Serious Conduct and Progressive Discipline

- ***Invista and KINWU*** (2004 – MacDowell)
- Arbitrator upheld discharge of employee with 25 years' service for minor culminating incident
- Grievor's record not particularly "egregious" – no theft, vandalism, breach of trust, dishonesty, gross insubordination, workplace violence
- Growing accumulation of different performance and attitudinal problems for which grievor was warned and disciplined
- Grievor failed to respond to attempts at corrective action
- Years of good service do not 'confer immunity from termination'

Arbitrator's Views on Progressive Discipline

- "… where the employer has properly followed the principles of progressive/corrective discipline, an arbitrator should not lightly intervene …it sends the wrong message, to employees if they come to believe that, despite their employer's restraint, and despite the proper application of established disciplinary principles, an outside arbitrator will routinely "second guess" their employer, and give them "one more chance." That not only undercuts the position of an employer who has "played by the rules", it also undercuts the purpose of progressive discipline itself. And it is a recipe for litigation."

ESA Severance Provision Unconstitutional

- ***ONA v. Mount Sinai Hospital*** (2005 – Ont. C.A.)
- ESA severance provision which disentitles severely disabled employees from receiving severance pay contravenes the equality rights guarantee in the *Charter*
  - Decision concerned former s. 58(5)(c) of ESA
- However, Court noted that Regulation 288/01 of ESA 2000 contained an "exception equivalent" to s. 58(5)(c)
  - Exemption does not apply where frustration is the result of an illness or injury suffered by an employee, and the *Human Rights Code* prohibits severing the employment (s. 9(2))

Implications of *Mount Sinai* Decision

- Similar exemption for notice of termination or termination pay under ESA
  - Employees whose contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstances
  - Subject to Human Rights Code
- Remains to be seen whether application of Court's reasoning will extend to termination provisions of ESA

Arbitral/OLRB Interpretation of ESA Emergency Leave Provisions

- ESA Emergency Leave Provisions
- Issues:
  - What constitutes an “urgent matter”
  - Notice requirements

Elkay Canada Ltd. (2004 – OLRB)

- Employee did not report for work on 2 consecutive days
- He provided his employer on both occasions with the reason for his absence:
  - On the first day, that his girlfriend was in labour
  - On the second day, that the baby had been delivered that morning
- On the third day, the employee did not report for work, failing to provide the employer with an explanation

Elkay Canada Ltd. (2004 – OLRB)

- The Board held that on the third day the employee was not entitled to leave as he had failed to advise his employer of the reason why leave was necessary

- The Board also held that the employee's absence on this day did not constitute an "urgent matter" as the baby had been delivered the day prior

Smurfit-MBI v. IPC (2004 - Hinnegan)

- Emergency leave claimed as result of death of dog and resultant distraught state of spouse
- Employee absent for a total of five working days
- Employer terminated the grievor under deemed termination clause (absent more than three consecutive days without reasonable cause)
- Employer was justified in invoking the deemed termination clause