LABOUR ARBITRATION UPDATE

September 28, 2017

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As a boutique labour and employment law firm, Emond Harnden has represented the interests of management in both official languages for over 30 years.

Originally rooted in the Ottawa community, we have grown to represent employers in all provinces and territories of Canada.

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ABOUT

Paul has experience representing both public and private sector employers in a wide range of labour and employment matters. He provides advice and representation in occupational health and safety prosecutions, WSIB claims, arbitration proceedings, wrongful dismissal litigation, and employment standards and human rights complaints. He also helps employers develop and implement strategies to minimize the costs associated with WSIB claims and terminations, and in achieving compliance with occupational health and safety, privacy, human rights, and employment standards obligations.

Paul also provides strategic advice and counsel to businesses on how to respond to union organizing campaigns, and represents employers in the litigation that often arises following an application for certification. He is particularly experienced in guiding construction industry employers through the special rules and procedures particular to their sector.

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ABOUT

J.D. graduated from Queen's University in 1989 with a BAH. After four years working as a management consultant specializing in labour relations and human resources, he received his LLB in 1996 from the University of Calgary and joined the firm in 1997.

He specializes mainly in the areas of labour and employment law with a particular emphasis on advocacy and litigation. J.D. works closely with his clients to understand their business and human resources needs in order to assist in providing advice and representation that reflects sound strategy to achieve short and long term goals.

In addition to providing counsel in rights and interest arbitrations and Labour Relations Board proceedings, J.D. advises and represents employers on certification applications and collective bargaining. He also assists clients with handling strike and lockout situations in addition to injunctions. J.D. acts as counsel to both public and private sector clients, including hospitals, post-secondary educational institutions and manufacturers.

OVERVIEW

Bill 148 – *Fair Workplaces, Better Jobs Act, 2017*

- Amendments to the *Employment Standards Act* ("ESA")
- Amendments to the *Labour Relations Act* ("LRA")

Case Law Update

- Addiction and Workplace Misconduct
- Managing Innocent Absenteeism
- Workplace Harassment

Status of Bill 148

- Introduced in the Legislature on June 1, 2017
- Standing Committee ("Committee") held public hearings in 10 cities across the province in July, and also received written submissions
- Committee referred an amended version of the Bill for 2nd reading on September 12, 2017
- Currently being debated at 2nd reading

Bill 148
ESA Amendments

Key Amendments Made to Bill 148 by Standing Committee

- Equal pay for equal work
- Scheduling/on-call rules
- Substitute holidays
- Pregnancy and parental leave
- Personal emergency leave
- Domestic or sexual violence leave
- Employer record keeping

Minimum Wage Increases

- No changes proposed by Committee
- Implications:
  - Increased labour costs (31.5% increase in less than 18 months)
  - Potential "ratcheting up" effect for employees currently making $15/hour or slightly more
  - Implications for recruitment practices, performance management, etc.
  - Potential job losses or lay-offs

Equal Pay for Equal Work

- Employers will have to eliminate differences in pay based on employment status (e.g. full-time v. part-time wage grids) unless an exception for wage differences applies
- Ensure any differences in pay rates are based on:
  - Seniority system;
  - Merit system;
  - System that measures earnings by quantity or quality of production; or
  - Factors other than sex or employment status
- Committee added an example of a seniority system
  - Includes a system that provides for different pay based on the accumulated number of hours worked
- A common feature of collective agreements is to have wage grids based on a seniority system

Equal Pay for Equal Work Transitional Period

- Committee shortened transitional period
- If collective agreement in place on April 1, 2018, contains provisions that permit different rates of pay based on employment status in conflict with the ESA, collective agreement will prevail until the earlier of:
  - Date the agreement expires; or
  - January 1, 2020
- Don't wait - start considering how to adjust wage grids now!
- May need to negotiate new pay grids with union

Scheduling Rules

- Request to change schedule or work location
  - No changes made by Committee
  - Right to request at 3 months service
- Committee clarified some of the proposed scheduling rules that will come into effect on January 1, 2019
- 3-hour reporting rule and new on call rule
  - Committee clarified do not apply where employee unavailable for work

Scheduling Rules

- Right to refuse work or on call assignment where provided less than 96 hours notice (4 days)
  - Committee added does not apply where work is:
    - To deal with an emergency;
    - To remedy or reduce a threat to public safety; or
    - Other prescribed reasons
- Shift/on call cancellation - 3 hours payment where cancelled with less than 48 hours notice
  - Committee added does not apply where:
    - Employee's work is weather-dependent; and
    - The employer cannot provide work for weather-related reasons; or
    - Other prescribed reasons
- Committee added a no pyramiding provision

Scheduling Rules

- Bill 148 originally stated where collective agreement provisions conflict with new scheduling provisions, the collective agreement prevailed
- Committee amendments:
  - If collective agreement in effect on January 1, 2019, contains scheduling provisions which conflict with ESA, agreement will prevail until earlier of:
    - Date the collective agreement expires; or
    - January 1, 2020
- Review collective agreement scheduling provisions
- Where collective agreement is silent, ESA will apply

Public Holiday Pay

- Committee amendments:
  - Revert back to *status quo* regarding substitute days off where employees work on a public holiday
  - Added new record keeping requirements – employers must provide written statement to employee which sets out:
    - Public holiday on which employee will work; date of substitute holiday; and, date statement was provided to the employee
- Committee did not amend new formula for calculation of public holiday pay. Effective January 1, 2018
- Implications of new formula for calculating public holiday pay
  - Significant increase in entitlement for employees who work less than full-time or irregular hours

Vacation Leave and Vacation Pay

- No changes from Committee
- Effective January 1, 2018, after 5 years of service, 3 weeks with vacation pay at 6%
- Collective agreements typically already meet or exceed this requirement and provide for a greater right or benefit

Personal Emergency Leave

- Effective January 1, 2018, employees will become entitled to:
  - 2 paid days; and
  - 8 days without pay
- Committee amendments:
  - Added a qualifying period for the 2 paid days – employed for 1 week
  - Clarified no overtime or shift premium payable for paid days
- Implications – depends upon whether collective agreement confers a greater right or benefit:
  - Number of days of leave under the collective agreement?
  - Leave with or without pay?
  - Reasons why leave can be taken?
- Legal challenges likely around when an employer can require a medical note
- Impact on attendance management programs and threshold to enter or progress through program

Pregnancy and Parental Leave

- Committee made 2 amendments
- **Pregnancy Leave**
  - Case of miscarriage or still birth – extended from 6 to 12 weeks. Effective January 1, 2018
- **Parental Leave**
  - Extended to match federal amendments to EI Act
    - Up to 61 or 63 weeks of unpaid job protected leave (currently 35 or 37 weeks); total combined pregnancy and parental leave increases from 52 to 78 weeks. Effective on proclamation
  - Under EI Act – employees will be able to opt for following parental leave benefits:
    - 35 weeks at 55% of average insurable weekly earnings (Jan. 1/17 max $543 per week)
    - 61 weeks at 33% of average weekly insurable earnings (Assume: max $326 per week)

Pregnancy and Parental Leave

- Implications for collective bargaining:
  - Provision of top-up during parental leave
    - If employee topped-up to a percentage of salary (e.g., 75%) then top-up owed on 33% EI will be much greater than top-up owed on 55% EI
    - Potential operational implications if significant percentage of employees opt to take extended leave

Domestic or Sexual Violence Leave

- Committee added new category of leave without pay where employee or a child of the employee experiences domestic or sexual violence, or the threat of either
- Eligibility:
  - 13 consecutive weeks of employment;
  - For specified purposes listed in the Act; and
  - Entitled to up to 10 days and 15 weeks of leave in each calendar year
- Collective agreements do not necessarily set out all ESA leaves

Other Leaves

- No changes from Committee
- Effective January 1, 2018
- Family Medical Leave
  - Increased from 8 weeks in a 26 week period to 27 weeks in a 52 week period
- Child Death Leave
  - 104 weeks
  - Death no longer required to be crime-related
- Crime-Related Child Disappearance Leave
  - Increased from 52 weeks to 104 weeks

Recording Keeping

- Committee added several new record keeping requirements to an Employer's existing obligations, e.g.:
  - Includes records on when employees are scheduled to work, hours actually worked, cancellation of shifts – for purposes of enforcing new scheduling rules
  - New requirements regarding vacation pay entitlements

Bill 148
LRA Amendments

A Union's Access to Employee Information

- Applies to non-certified workplaces/employees
- A union can apply for an order requiring an employer to provide a list of employees
  - An employee list includes names, phone numbers, and personal email addresses
- A union must show at least 20% support of the proposed bargaining unit
- Committee amendments require employers and unions to ensure the security/confidentiality of the list
- Deemed to comply with privacy legislation

Request for Educational Support after Notice to Bargain

- Educational support provision added by Committee
- Applies following a union's notice to bargain
- May apply where there is first contract arbitration
- Either party can apply for educational support in labour relations/collective bargaining
- A first collective agreement mediator will make educational support available

Consolidation of Bargaining Units After Certification

- Committee removed proposed amendment to allow OLRB to review and change structure of existing bargaining units where it determines they are no longer appropriate
- New OLRB power to consolidate units after a successful certification remains
- The goal is to develop effective collective bargaining relationships

Acquisition of Bargaining Rights

- No Committee amendments, but significant change
- Introduces card-based certification in specific industries (building services, home care and community services, temporary help agency sector)
- Unions can be certified without a vote
- May be no open organizing campaign to allow employers to communicate with employees about unionization
- The remedial certification provisions have been amended

Case Law Update

Addiction – Is it a Defence to Workplace Misconduct?

Cambridge Memorial Hospital and ONA, 2017 CanLII 5289 (Randall)

Facts:

- RN had 28 years of service and clear disciplinary record
- Stole opioids from the employer Hospital
- Only after further investigation did Hospital learn she had been stealing for some time, and diverting opioids from patients
- Discharged for just cause
- ONA argued that arbitrators have agreed: a non-disciplinary approach applies and the Hospital has a duty to accommodate

Cambridge Memorial Hospital and ONA, 2017 CanLII 5289 (Randall)

Findings:

- Just cause dismissal upheld
- Arbitrator preferred a line of cases from British Columbia (the "Hybrid Approach") to the Ontario line of cases:
  - "*I don't accept that…establishing a nexus between the addiction and the misconduct is, in itself, a defence to termination…it is not prima facie evidence of discrimination…*"
- Considered the grievor's addiction, and found her misconduct was **not** caused by addiction-related compulsion
- The grievor's failure to admit the full extent of her misconduct meant her discharge could not be mitigated

Cambridge Memorial Hospital and ONA, 2017 CanLII 5289 (Randall)

Practical Implications:

- Addiction is not a "get out of jail free card"
- Arbitrators are more likely to apply this approach when the employee has only disclosed an addiction after being caught
- As an employer, how can you assess the nature of an employee's addiction and whether it has compelled them to engage in misconduct?

Attendance Management and Managing Innocent Absenteeism – Emerging Issues

OPSEU v. Ontario (Ministry of Children and Youth Services), 2016 ONSC 5732 (Div. Ct.)

Facts:

- Youth services worker with chronic degenerative back condition suffered from erratic flare ups
- Absenteeism of 70 absences/year; 25% above institutional average
- Employee rejected accommodation proposals as had no particular "workplace barriers"
- Once there was no suggestion that his absenteeism would improve in the foreseeable future, employer terminated employee for innocent absenteeism

OPSEU v. Ontario (Ministry of Children and Youth Services), 2016 ONSC 5732 (Div. Ct.)

GSB Findings:

- Grievance dismissed
- No breach of the duty to accommodate

OPSEU v. Ontario (Ministry of Children and Youth Services), 2016 ONSC 5732 (Div. Ct.)

Findings on Judicial Review:

- The GSB's decision was reasonable
- The duty to accommodate does not require employers to permit employees to be regularly absent from the workplace
- The duty to accommodate does not change the fact that it is the employee's duty to perform work in exchange for remuneration; the duty does not allow employees to avoid holding up their end of the bargain

OPSEU v. Ontario (Ministry of Children and Youth Services), 2016 ONSC 5732 (Div. Ct.)

Practical Implications:

- In order to be able to address innocent absenteeism and support an eventual termination if necessary, have an AMP in place
- While the necessary elements of an enforceable AMP are still being litigated, the AMP must at least:
  - Be non-punitive
  - Distinguish between non-culpable absences and culpable ones
  - Offer employees opportunities to improve their attendance
  - Specify the consequences of not improving attendance
  - ***Take into account the duty to accommodate in each individual case

Canada (AG) v. Bodnar, 2017 FCA 171 CanLII

- Recent Federal Court of Appeal decision (August 22, 2017)
- Judicial review of a PSLREB decision in *Bodnar v. Treasury Board (Correctional Services Canada)*
  - PSLREB had found National AMP discriminatory because both disability and family-related leaves "counted" for both group averages and employee's individual absences count
- FCA overturned the decision, finding that no employees suffered adverse treatment because of those absences being included, and so no discrimination on the basis of disability or family status

Workplace Harassment – Bill 132
One Year Later

ONA v. Humber River Regional Hospital, August 3, 2017 (Goodfellow)

Facts:

- An RN filed 20 allegations of harassment against her manager, including allegations that she had been "singled out for excessive scrutiny" and that the manager had a "personal issue" with her, as well as discrimination on the basis of disability
- The employer Hospital investigated and found the allegations unsubstantiated
- ONA grieved, alleging that the Hospital's investigation had been biased and in breach of its own policies

ONA v. Humber River Regional Hospital, August 3, 2017 (Goodfellow)

Findings:

- Grievance dismissed
- *"Managers have the right to be wrong, to make mistakes, to occasionally over react or under react…"*
- Hospital acted in good faith
  - During an internal harassment investigation, the employer's duty is to conduct a good faith investigation, but it is not a judicial or even quasi-judicial process

ONA v. Humber River Regional Hospital, August 3, 2017 (Goodfellow)

Practical Implications:

- When it comes to actions that may constitute harassment, management is held to a standard of reasonableness - not perfection
- Investigations similarly require good faith, not perfection
  - That being said, investigation best practices should still be applied, including:
    - Appointing a skilled, neutral investigator
    - Maintaining confidentiality to the extent possible
    - Ensuring the respondent knows the case against them
    - Interviewing all relevant witnesses
    - Reviewing all relevant documents


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