Breakfast Seminar Series

2019 LABOUR ARBITRATION UPDATE

THE YEAR IN REVIEW

October 9, 2019

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 territories and provinces of Canada.

J.D. Sharp

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ABOUT

After four amusing years, J.D. barely graduated from Queen's University with a BA (Hons). He then worked as a labour relations consultant assisting employers with labour relations and human resources issues, acting as a part-time human resources department for organizations that did not have full-time HR support. This work experience also helped minimize an academic record consistent with the above-mentioned four years of fun in Kingston. It also permitted him to be accepted into the Faculty of Law at the University of Calgary, from which he graduated in 1996, much to his family's disbelief. It was at this point that J.D. grew tired of shamelessly promoting himself in the third-person…

I am a firm (some use the term "zealous") believer in management rights and my practice is devoted to supporting employers in effectively managing the human resources side of their organizations. I provide strategic advice, representation and counsel regarding labour, employment, human rights, health & safety and other employment-related areas of the law.

My primary focus is advocacy for employers, including litigation, negotiation and mediation. Regardless the situation, I seek a cost-effective solution that respects the fundamental rights of the employer to manage. In order to assist clients with achieving their objectives, I provide advice and assistance with planning both long and short-term strategies which advance the organization's goals with respect to its relations with employees and unions.

The standard view of bios is that they should contain some personal information, so here it is: I played a number of sports competitively, but none of them well enough that you would have heard of me. I thoroughly dislike losing. My time as a tennis coach specializing in training high-performance junior tennis players was a highlight of my athletic pursuits. I am fortunate to have a wife who understands and supports my passion for being a management-side labour lawyer. I am equally fortunate to have an amazing daughter who makes it easy to leave the work that I love at the end of the day.

Paul Lalonde

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ABOUT

Paul serves a large client base in the public, broader public and private sectors, including employers who operate in the construction industry. He provides counsel in a wide range of labour and employment matters, and has gained considerable experience in the areas of employee and labour relations as well as occupational health and safety, and workplace safety and insurance.

Paul provides strategic advice and counsel to employers faced with union organizing campaigns, and frequently represents employers in unfair labour practice complaints, applications for certification, and other proceedings before labour boards. He also has considerable collective bargaining experience, often acting as the spokesperson for his clients at the bargaining table, and when necessary providing strategic advice in strike and lockout situations, and representation at interest arbitration proceedings.

Paul also provides advice and representation in wrongful dismissal, employment standards, and human rights matters, and assists employers with the development and implementation of strategies to minimize the costs associated with terminations and workplace accidents, and in achieving compliance with the numerous and seemingly ever increasing statutory and other legal obligations that are imposed on employers.

Paul is a Carleton University graduate and obtained his Bachelor of Laws degree from Queen's University. He was called to the Bar of Ontario in July 2003. Originally from Ottawa, Paul joined a management-side labour and employment boutique in Toronto soon after his call to the Bar. He returned home in January 2006 when he joined Emond Harnden and he has been a Partner at the firm since 2013.

Medical Cannabis

- ✓ Recreational cannabis legal for almost a year
- ✓ Medical cannabis legal since 2001
- ✓ Employers have duties under human rights and OHS legislation
- ✓ Competing obligations
  - o Duty to accommodate vs. safe workplace / fitness for duty
- ✓ Recent case addressed safety risks due to inability to measure residual impairment

IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc., 2019 NLSC 48

FACTS

- Grievor had prescription for medical cannabis; consumed every evening after work
- Had trialed many alternative therapies and medications; cannabis was last resort
- Was denied safety-sensitive position on construction project
- No non-safety-sensitive positions were available
- Union alleged discrimination and breach of duty to accommodate; Arbitrator denied grievance
- Union challenged decision before NL Supreme Court

IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc., 2019 NLSC 48

FINDINGS

- NL Supreme Court upheld Arbitrator's decision
- Medical cannabis can impair ability to function safely in safety-sensitive environment
- Safety hazard introduced by residual impairment from daily use of cannabis
    - Impairment can last up to 24 hours
- Affirmed Arbitrator's decision that inability to measure residual impairment and manage risk of harm constituted undue hardship

IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc., 2019 NLSC 48

KEY TAKEAWAYS

- Seek medical information to determine whether consumption will affect or impair employee's ability to perform duties safely
- Requirement to accommodate medical cannabis in safety-sensitive position may cause undue hardship
- However, must be assessed on case-by-case basis
  - Do not assume anything
  - Conduct individual assessment of employee's ability to work safely in particular work environment

Disability-Related Misconduct and Addiction

- ✓ Addiction = disability under human rights legislation
- ✓ Addiction may be factor in conduct that would otherwise constitute misconduct
- ✓ Addiction may impact employee's ability to make choices about their conduct
- ✓ May have to treat as accommodation issue vs. disciplinary

Regional Municipality of Waterloo (Sunnyside Home) v ONA, 2019 CanLII 433 (ON LA) – Arbitrator Steinberg

FACTS

- Grievor (Registered Nurse) was terminated for misappropriating narcotics from patients for personal use and falsifying medical records to conceal actions
- Union filed grievance alleging that employer failed to accommodate grievor's opioid addiction

Regional Municipality of Waterloo (Sunnyside Home) v ONA, 2019 CanLII 433 (ON LA) – Arbitrator Steinberg

FINDINGS

- Opioid use disorder is disease; persons suffering from that disease have little or no control over their addiction
- Breach of workplace rules (prohibition against diversion of narcotics and falsification of medical records) were due to addiction
- Employer breached procedural duty to accommodate
  - Did not take steps to consider potential need for accommodation
  - Observations and reports about grievor's behaviour and appearance should have led employer to perceive existence of disability
- Grievor was reinstated; employer ordered to accommodate and compensate her

Regional Municipality of Waterloo (Sunnyside Home) v ONA, 2019 CanLII 433 (ON LA) – Arbitrator Steinberg

KEY TAKEAWAYS

- Duty to accommodate includes duty to inquire where employer has reason to believe that employee may be suffering from disability
    - Duty to inquire into possible relationship before making decision that would affect employee adversely
- Discriminatory intent by employer is not required to demonstrate *prima facie* discrimination

Duty to Accommodate

- Scope of employer's duty to accommodate
  - Procedural component (process)
  - Substantive component (accommodation provided)
- Individualized approach
- Everyone has role to play in accommodation process
- Accommodation = Needs, NOT preferences

Family Status

- Applicable test to prove family status discrimination remains unsettled in Canada
- BC Court of Appeal – *Campbell River/Envirocon* test
  - Change in term or condition of employment results in “serious interference” with “substantial” parental or other family duty or obligation of employee
- Federal Court of Appeal – *Johnstone* test
  - Test engages employee’s legal responsibility for child and includes requirement to take reasonable “self-accommodation” steps
- Ontario Human Rights Tribunal – *Misetich* test
  - Test is no different and no higher than test for other grounds under *Human Rights Code*
  - Negative impact on family need that results in “real disadvantage”

APFFA, Local 1092 v Ajax (Town), 2019 CanLII 69278 (ON LA) – Arbitrator Parmar

FACTS

- Grievor was female suppression firefighter scheduled on 24-hour shift
- Informed employer that she was pregnant and would require accommodations; medical restrictions prevented grievor from responding to emergency calls
- Employer policy was to assign firefighters who required accommodation for extended period to day shift; grievor was assigned modified duties on day shift
- Union filed grievance alleging discrimination and breach of duty to accommodate because grievor was not assigned modified duties on her regular 24-hour shift
    - Union also alleged employer engaged in discrimination on basis of family status, given her childcare needs

APFFA, Local 1092 v Ajax (Town), 2019 CanLII 69278 (ON LA) – Arbitrator Parmar

FINDINGS

- Employer met procedural duty to make serious effort to consider and assess issue of accommodation in all circumstances
- Under substantive duty, employer was not required to staff additional employee to perform duties that grievor could not perform on 24-hour shift (grievor could not perform essential duties on 24-hour shift)
- No evidence that grievor suffered disadvantage related to childcare obligations due to schedule change
- Grievor wanting childcare in different structure to address specific way she and her husband wished to raise their child was not disadvantage based on family status; childcare obligations did not prevent her from attending work on day shift

APFFA, Local 1092 v Ajax (Town), 2019 CanLII 69278 (ON LA) – Arbitrator Parmar

KEY TAKEAWAYS

- Employers are not required, as form of accommodation, to assign extra staff to perform duties that employee seeking accommodation cannot do
- Employers not required to fundamentally change nature of work they need done
- Assignment of work must be productive and meaningful; no requirement to create “make-work” assignments
- Arbitrator cited *Misetich* test = more than simply establish negative impact on family need; must result in “real disadvantage” to parent/child relationship and responsibilities that flow from same

Workplace Harassment and Duty to Investigate

- #MeToo movement has had significant ripple effects
- New spotlight on sexual harassment within workplace
- Employers have duties under human rights and OHS legislation to prevent workplace harassment (including sexual harassment)
- Employers have duty to investigate
- Failure to take appropriate steps can be costly

Doro v CRA, 2019 FPSLREB 6 – Adjudicator Gray

FACTS

- Grievor was CRA appeals officer that was sexually harassed by direct supervisor both at work and outside of work
- Investigation took 2 years; investigator concluded 13 different incidents of sexual harassment occurred
- Supervisor received 6-day suspension without pay
- Grievor alleged breach of no-discrimination clause in collective agreement and *Canadian Human Rights Act*
    - Requested award of damages and out-of-pocket costs for psychological treatment

Doro v CRA, 2019 FPSLREB 6 – Adjudicator Gray

FINDINGS

- Employer failed to adequately take steps to prevent sexual harassment
- Employer's response was prompt, but inadequate to address sexual harassment and mitigate its harmful effects on grievor
  - 2-year investigation was unacceptable amount of time for all parties involved
- Employer should have acted quickly to remove supervisor from workplace and provide grievor with safe work environment
  - Adjudicator found it "appalling" that employer pressured grievor to move her workplace to different city but felt it inappropriate to move supervisor's office to different floor of same building
- Grievor awarded over $60,000

Doro v CRA, 2019 FPSLREB 6 – Adjudicator Gray

KEY TAKEAWAYS

- Respond to harassment allegations promptly
- Positive obligation on employers to investigate all incidents and complaints of workplace harassment (including sexual harassment)
- Have capable, unbiased investigators (internally or externally) conduct thorough and timely investigations
- Consider need to physically/operationally separate complainant and respondent in administrative/non-disciplinary manner pending investigation

Benefit Disputes at Arbitration

- ✓ Mandatory retirement at age 65 eliminated in 2006
- ✓ Despite this, Code and ESA allow employers to choose not to provide benefits to employees aged 65 and over
  - o *Talos* decision (HRTO – 2018) found this exception was unconstitutional; decision did not address LTD, pension plans and superannuation funds (limited to group health, dental and life insurance)
  - o Impact of *Talos* remains to be seen; legislative exception still in effect (HRTO does not have jurisdiction to issue declaration of invalidity)
- ✓ Increase in benefit disputes at arbitration

Benefit Disputes at Arbitration

- ✓ 2018 decision (Markham Stouffville Hospital) found that LTD coverage would continue for employees who worked past their 65th birthdays, absent clear and unambiguous language
  - o Master policy = ineligible for coverage as of 65
  - o Collective agreement referred to “eligible employees” as described in 1992 HOODIP booklet
  - o Employer argued text of Insurer’s plan was incorporated into collective agreement because it was referenced in booklet
  - o Majority of Arbitration Board found that nothing in collective agreement or 1992 HOODIP booklet stated that LTD coverage ended at 65
- ✓ Judicial review before Ontario Divisional Court was heard on September 16, 2019 (awaiting decision)

OPFFA v City of Ottawa (2019) – Arbitrator Keller

FACTS

- Union filed 11 grievances alleging employer failed to provide certain benefits under collective agreement
- Union argued there could be no restriction on benefits unless expressly provided for in collective agreement
- Arbitrator had to determine preliminary questions, such as whether limits existed outside express terms of collective agreement

OPFFA v City of Ottawa (2019) – Arbitrator Keller

FINDINGS

- Arbitrator found that collective agreement did not provide all-encompassing, comprehensive benefits plan
- There can be Reasonable and Customary (R&C) limits as long as they do not deprive employees of negotiated benefits

OPFFA v City of Ottawa (2019) – Arbitrator Keller

KEY TAKEAWAYS

- Benefits may be subject to R&C limits set by insurance carrier, even if not specified in collective agreement
- Limitation must not deprive employees of negotiated benefits in collective agreement

Breach of Settlement Confidentiality Clause

- ✓ Confidentiality clauses are common in settlement agreements
- ✓ Arbitrators recognize
  - o Value in resolving labour disputes through settlements
  - o Importance that confidentiality plays in settlement process
- ✓ Recent decision absolved employer of payment obligation for employee's breach of MOS confidentiality clause

Acadia University v AUFA, 2019 CanLII 47957 (ON LA) – Arbitrator Kaplan

FACTS

- Parties, including grievor, voluntarily entered into MOS regarding termination of grievor, who was tenured professor
- MOS provided grievances were resolved without admission of liability or culpability
- Parties agreed to keep terms strictly confidential
- Grievor made various posts on his Twitter page, including being vindicated and referencing money/severance
- Employer took position that it should not be required to make any without prejudice payment to grievor because of his repeated MOS breaches

Acadia University v AUFA, 2019 CanLII 47957 (ON LA) – Arbitrator Kaplan

FINDINGS

- Grievor breached MOS
- Was attempting to suggest by use of “vindicated” and by repeated reference to “severance” that there was some kind of acknowledgment of employer wrongdoing
- Repeatedly broke his promise of confidentiality and to limit his comments about how this matter was resolved
- Settlements in labour law are “sacrosanct”
- Given repeated and continuing breaches, together with absence of any mitigating circumstance or explanation, employer was no longer required to honour settlement payment

Acadia University v AUFA, 2019 CanLII 47957 (ON LA) – Arbitrator Kaplan

KEY TAKEAWAYS

- Important to include well drafted non-disclosure or confidentiality clause in MOS, including setting out clear consequences for breaching such clause

- Serious consequences that flow from employees' breach of non-disclosure obligations will enable employers to continue negotiating settlements without fear that payment terms will set precedents for, or encourage, other grievances (including non-meritorious ones)

Just Cause for Dismissal

- ✓ Fact-specific; determined on case-by-case basis
- ✓ Onus on employer to demonstrate just cause on balance of probabilities
- ✓ Penalty must be appropriate in circumstances
- ✓ Progressive discipline
- ✓ Arbitrators consider aggravating and mitigating factors

St. Joseph's Health Centre v CUPE, 2019 CanLII 88147 (ON LA) – Arbitrator Kaplan

FACTS

- After vacation request was denied, grievor improperly and dishonestly applied for employer's family medical/compassionate care leave
- Grievor obtained leave under false pretences; no serious medical condition justifying leave under policy
- Grievor posted pictures on Facebook that were inconsistent with stated purpose for leave (portrayal of family vacation)
- Disciplinary record, including dishonesty-related misconduct
- Grievor was terminated

St. Joseph's Health Centre v CUPE, 2019 CanLII 88147 (ON LA) – Arbitrator Kaplan

FINDINGS

- Grievor was repeatedly dishonest
  - In applying for leave;
  - When asked about it upon her return; and
  - When she was far from forthright in her evidence at arbitration

- Although grievor was long-service employee, this factor did not mitigate penalty because she took no responsibility for any actions, even when presented with evidence of her dishonesty
- Termination upheld

St. Joseph's Health Centre v CUPE, 2019 CanLII 88147 (ON LA) – Arbitrator Kaplan

KEY TAKEAWAYS

- Dishonesty is considered serious form of misconduct by arbitrators
- Each case of dishonesty will be examined in context by arbitrators
  - Weighing both aggravating and mitigating factors to determine if just cause exists; and
  - If discretion ought to be exercised to substitute lesser penalty for termination

Questions ?

AN INTEGRAL PART OF YOUR TEAM

PARTIE INTÉGRANTE DE VOTRE ÉQUIPE

EMOND HARNDEN

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