LABOUR ARBITRATION UPDATE

September 27, 2018

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.

PAUL LALONDE

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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.

J.D. SHARP

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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

- Workplace sexual harassment: when is termination warranted?
- Personal emergency leave (PEL) days under the amended *ESA*: do you already provide a greater right or benefit?
- Cannabis in the workplace: is a disability a “free pass” to smoke grass?

Discipline for Workplace Sexual Harassment

Re Metro Rideau Store v. UNIFOR Local 414 (Arbitrator Baxter, 2018)

Facts:

- 61-year-old employee with 8 years' service and clean disciplinary record terminated for sexual harassment
- Female co-worker alleged grievor:
  - Came up behind her in lunch room and inappropriately touched her
  - Blocked her in an aisle and attempted to talk to her the next day
- Grievor said he did come up behind co-worker but did not touch her inappropriately; did not attempt to block her path the next day

Re Metro Rideau Store v. UNIFOR Local 414 (Arbitrator Baxter, 2018)

Findings:

- Grievor did engage in sexual harassment by touching co-worker in uninvited and inappropriate way
- Discharge not excessive
- Sexual harassment is "*gross misconduct of the vilest kind*"; as serious as theft
- *"Discharge is prima facie the appropriate penalty, even in the case of a first offence"*
  - No exception to that rule could be made here
  - Grievor persistently denied any misconduct, failed to admit any wrongdoing, and would not apologize

Re Metro Rideau Store v. UNIFOR Local 414 (Arbitrator Baxter, 2018)

Practical Implications:

- While a blanket "zero tolerance" approach to sexual harassment will not be defensible, termination remains possible
- Aggravating and mitigating factors must be taken into account
- Discharge is a last resort when there is no reasonable prospect that a lesser penalty will protect the interests of the employer and provide sufficient correction and deterrence

PEL:
What's a Greater Right or Benefit?

USW, Local 2020 and Bristol Machine Works Ltd. (Arbitrator Mitchnick, 2018)

Facts:

- Grievors called in sick following the introduction of paid PEL on January 1, 2018
- Employer denied their requests for PEL, claiming the collective agreement provided a greater benefit when employees are ill:
  - Short-term disability for 17 weeks
  - Long-term disability indefinitely
  - But:
    - 7-day waiting period
    - 18 months' service needed for LTD

USW, Local 2020 and Bristol Machine Works Ltd. (Arbitrator Mitchnick, 2018)

Findings:

- Collective agreement did provide a greater benefit than PEL under the *ESA* as it relates to personal illness
- Grievors **not** entitled to an additional two paid PEL days
- Preferred approach: compare the totality of the collective agreement benefit vs. the totality of the *ESA* benefit; avoid a "line by line" approach
- The fact that the collective agreement plan had a waiting period and restrictions on service didn't "*negate the vast superiority of the collective agreement's Income-protection plan*"

USW, Local 2020 and Bristol Machine Works Ltd. (Arbitrator Mitchnick, 2018)

Practical Implications:

- Assessment of whether a collective agreement provides a greater benefit than the *ESA* requires consideration of the **totality** of benefits offered
- A collective agreement benefit may be a greater benefit, even if there is a sub-group of employees (e.g., probationary employees) who get a lesser benefit than the *ESA* minimum

Carillion Services Inc. and LIUNA, Local 183 (Arbitrator Rogers, 2018)

Facts:

- Grievors entitled to 3 floater days per year, to be drawn down:
  - By employee, at their discretion, and
  - By employer, when employee AWOL
- Floater entitlement year ran July 1 to June 30
- Grievors used all 3 floater days in 2017, and requested paid PEL once introduced in January 2018
- Employer refused, and union grieved

Carillion Services Inc. and LIUNA, Local 183 (Arbitrator Rogers, 2018)

Findings:

- *ESA* entitlement to PEL was **in addition to** 3 floater days provided under collective agreement
- Arbitrator found floater days and PEL too different:
  - Different purposes
  - Different entitlement years
  - No requirement for employees to save floaters to use in lieu of PEL days

Carillion Services Inc. and LIUNA, Local 183 (Arbitrator Rogers, 2018)

Practical Implications:

- Arbitrators will be resistant to any attempt by employer to argue that employees not entitled to paid PEL
- In order to prove collective agreement entitlement is a greater benefit than *ESA* PEL, ensure leaves being compared have the same purpose and time frame
  - "Apples to apples" lives on

New this Month

- *Corporation of the Town of Oakville v. Oakville Professional Fire Fighters Association, Local 1582* (Arbitrator Stout, September 9, 2018)
  - Grievor denied PEL because failed to provide any adequate reasons or evidence in support

- *United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, Local 9235 v. St. Marys Cement* (Arbitrator Nyman, September 14, 2018)
  - No greater benefit, as collective agreement provided more paid leave…to be used less frequently and in rarer cases than PEL

Cannabis, Disability and the Workplace

Aitchison v. L & L Painting and Decorating Ltd., 2018 HRTO 238

Facts:

- Seasonal painter of high rise buildings had prescription to smoke medical cannabis for chronic pain
- Employer had zero tolerance drug policy
- Employee terminated for smoking cannabis at work…alone, on a swing stage, 37 floors above the ground

Aitchison v. L & L Painting and Decorating Ltd., 2018 HRTO 238

Findings:

- Application dismissed
- Use of medical marijuana breached employer's zero tolerance policy
- Termination not discriminatory
  - Employee had a disability, but hadn't requested accommodation
  - Employer not required to consider accommodation after employee already provided grounds for his own termination

Aitchison v. L & L Painting and Decorating Ltd., 2018 HRTO 238

Practical Implications:

- There is no "*absolute right to smoke marijuana at work regardless of whether it is used for medicinal purposes*"
- Employers continue to have the right to manage their workplaces and ensure occupational health and safety
- A zero tolerance policy for alcohol and drugs may be used to support a termination, especially if there are health and safety concerns
  - As always, however, consider individual circumstances, be flexible, and apply the duty to accommodate

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