

2014 OASIS Conference

Navigating the Hurdles: A Legal Perspective

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2014 OASIS Conference
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AGENDA

- Employment Standards Update
- Human Rights – Accommodation of Medical and Family Status Issues
- Employers' Rights to Medical Information
- Workplace Violence and Harrassment
- Conclusions and Q & A

Employment Standards Update

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Employment Standards Act, 2000 - Update

OVERVIEW

- Minimum Wage
- New Pending Statutory Leaves of Absence
- Managing Personal Emergency Leaves

Employment Standards Act, 2000

MINIMUM WAGE

- \$11.00 – effective June 1, 2014
- Announced intent to tie future increases to Consumer Price Index

Employment Standards Act, 2000

EXISTING UNPAID JOB-PROTECTED LEAVES

- Pregnancy Leave
 - 17 weeks
- Parental Leave
 - Up to 37 weeks (up 35 weeks if pregnancy leave is taken)
- Personal Emergency Leave
 - Up to 10 days/year
- Family Medical Leave
- Organ Donor Leave
 - 13 weeks – up to 26
 - Undergo surgery to donate all or part of the one of the following organs: kidney, liver, lung, pancreas or small bowel
- Reservist Leave
 - Military reservists -“time necessary to engage” in deployment of operation

Employment Standards Act, 2000

BILL 21 – Passed April 29, 2014 – IN EFFECT October 29, 2014

- Family Caregiver Leave
 - 8 weeks
 - To provide care and support to a family members with a serious medical conditions
- Critically Ill Child Care Leave
 - Up to 37 weeks
 - To provide care to critically ill child
- Crime-Related Child Death and Disappearance Leave
 - Up to 52 weeks for parents of a missing child
 - Up to 104 weeks for parents of a child that has dies as a result of a crime

Employment Standards Act, 2000

Managing Personal Emergency Leaves

- Entitlement
- “Reasonable Evidence in the Circumstances”

Employment Standards Act, 2000

Managing Personal Emergency Leaves

- It's a statutory leave!
- Statutory unpaid leave
- Illness, death or urgent matter
- Up to 10 days per calendar year
- Part day counts as full day

Employment Standards Act, 2000

Personal Emergency Leave Considerations

- s. 74 prohibits employers from discharging or otherwise penalizing an employee for exercising his/her statutory right to take personal emergency leave

Employment Standards Act, 2000

Scope of Leave

What is the purpose of “personal emergency leave”?

- personal illness, injury or medical emergency of the employee
- death, illness, injury or medical emergency of a listed family member
- an urgent matter concerning a listed family member

Employment Standards Act, 2000

Listed Family Members (ESA s.50(2))

- employee's spouse
- parent, step-parent, or foster parent of employee or employee's spouse
- child, step-child or foster child of employee or employee's spouse
- grandparent, step-grandparent, grandchild or step-grandchild of employee or employee's spouse
- spouse of a child of the employee
- employee's brother or sister
- relative of the employee who is dependant on employee for care or assistance

Employment Standards Act, 2000

Notice of Intention to Take Leave

- Advance notice, or as soon as possible after leave begins
- Written notice not required

Employment Standards Act, 2000

Do you need to say – “Personal Emergency Leave”?

- Not necessarily
- Need only identify circumstances
- Section 50(7) An employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave.

Employment Standards Act, 2000

Assessing whether the reason for absence qualifies for Personal Emergency Leave

- The sooner the better;
- Seek who, what, when, where, why and how;
- Document process;
- Collect all evidence;
- Retain all evidence;
- Ask open ended questions so as to bring out the story;
- Interview employee and potential witnesses;
- Ask employee and witnesses to sign written statement;
- Take notes.

Employment Standards Act, 2000

What constitutes an “urgent matter”?

- Is the employee entitled to a personal emergency leave day?
 - Son broke leg last night playing hockey
 - Death of the family dog
 - Babysitter called in sick
 - Basement of elderly parent floods
 - Attend a brother’s wedding
 - Attend a child’s sporting event
 - “kid”
 - “up all night with kid”

Employment Standards Act, 2000

***SYSCO CENTRAL ONTARIO INC. AND
TEAMSTERS, LOCAL 419 (2013 CanLII 76889
(ON LA)***

- Arbitrator not prepared to speculate and infer that children was sick as submitted by Union
- Grievance dismissed

Scenario 1

Ralph is scheduled to work the 3 p.m. to 11 p.m. shift. On November 4th Ralph calls his supervisor at noon to advise that his girlfriend is in labour with their baby and he will not be in. On November 5th, at noon, Ralph calls his supervisor to advise that his girlfriend had their baby at 5:30 a.m. and he will not be in. On November 6th, Ralph calls in to the receptionist and advises that he will not be in today as his girlfriend gave birth yesterday.

Is Ralph entitled to personal emergency leave for the above-noted days?

Scenario 1

Access Alliance Multicultural Community Health Centre and UFCW Local 175 (2012 CarswellOnt 17349 (Ont. Arb.))

- Grievor claimed PEL “due to the illness of his mother”
- Union argued “name of individual and a statement that they ill” – all that is required

Access Alliance Multicultural Community Health Centre and UFCW Local 175 (2012 CarswellOnt 17349 (Ont. Arb.))

Arbitrator held – “reasonable in the circumstances allow for consideration of a variety of factors, including:

- Duration of the leave
- Absenteeism record
- Difficulty, expense and practicality of obtaining verification
- Whether there are reasons to question the truthfulness of the request
- Can request medical not to verify illness – if individual provides consent
- NOT diagnosis or treatment plan

Scenario 2

George is absent on April 12th. George advises that he is taking a personal emergency leave day on account of personal illness and is asked to produce a medical note. On April 14th, George is advised that he has until April 20th in which to produce the medical note. George does not produce a medical note.

Is George entitled to a personal emergency leave day on April 12th?

Can George be disciplined for failing to produce a medical note?

Scenario 3

What Constitutes “Evidence Reasonable in the Circumstances”?

Gayle is absent April 28th, 29th and 30th, claiming personal emergency leave on account of personal illness. Gayle returns to her afternoon shift on May 3rd with a note from her doctor dated May 1 that states: “Gayle advises she was ill and unable to work on April 28, 29 and 30.”

Human Rights –Accommodation of Medical and Family Status Issues

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Human Rights Code

- *Human Rights Code* prohibits discrimination and harassment in employment based on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, **family status** or **disability**.

Human Rights Code

- Duty to Accommodate to the point of "Undue Hardship" – Must meet two parts:
 - Procedural component
 - Substantive Component
- For disability - Essential Duties of the Job

Duty to Accommodate

- Procedural:
 - Obtain all relevant information about disability, (including current medical condition, prognosis, ability to perform duties, capabilities for alternate work
 - For other grounds, obtain all information about accommodation requested, etc.
 - Family Status Issues
 - Who, what, why? Special circumstances? What has the Employee tried to address it?

Duty to Accommodate

- Procedural (cont...)
 - Employee has a corresponding "duty to cooperate" – a "two way street":
 - Means answer questions, explore and consider alternatives, work with the employer ("
 - Employer must seriously consider how employee can be accommodated
 - Start with employee's job, can then consider other jobs, combinations, reallocate some duties, change hours, performance measures, etc.

Duty to Accommodate

- Substantive:
 - Employer bears onus to show could not have accommodated without undue hardship
 - Limited considerations in *Code*: cost, outside sources of funding, if any, and health and safety requirements.
 - Safety – risk and to whom? Level must be "serious", not just expensive or an inconvenience to employer or others
 - "Impossible" to accommodate without risking "reasonable safety"
 - Cannot be impressionistic, anecdotal, or after the fact

Duty to Accommodate

- Substantive (cont...)
 - Short term vs. Long Term
 - More expected on short term
 - "Needs" of employee, not "*Preferences*"
 - Not entitled to "perfect" accommodation

A Note on Attendance Management

- Consider whether you have a formal program and policy?
- Key again - distinguish culpable from non-culpable
 - Must understand reasons for absences
 - Is there a *Human Rights Code* issue?
 - Culpable then follow discipline
 - Non-Culpable then coaching – assistance
 - Can still lead to termination but process different
 - final warning, clear steps, accommodation

Duty to Accommodate and Family Status

- Family Status becoming more prevalent issue
 - Affects almost everyone if you are a parent or child – "sandwich generation"
- Follow the procedure and substantive requirements of accommodation
- Recent case examples regarding accommodation of Family Status
 - *Power Stream Inc. (Jesin)*
 - *Devaney v ZRV Holdings (2012 HRTO)*
- Ask questions – consider options. Remember Employee cooperation is required!

Consequences of Failure to Accommodate

- Civil Law Suit
- Breach of *Code* can be included in claim
 - Breach of Duty
 - General or Moral Damages
 - Aggravated/Punitive Damages
 - *Keays v. Honda*
- Human Rights Tribunal and/or Labour Arbitration
 - Damages + Reinstatement

Frustration of Contract / Innocent Absenteeism

- Common Law - Frustration
 - Consider position, service, context
- Labour Law – Innocent Absenteeism
 - Past absenteeism record far in excess of others
 - Future prognosis is that likely will NOT improve

Frustration of Contract / Innocent Absenteeism

- Process:
 - Medical information is key
 - You/employee/the lawyers- aren't doctors
 - Must get objective medical evidence
- Must consider ESA, Common Law, Collective Agreement, *Human Rights Code*
- If terminate - must:
 - Show accommodated to undue hardship
 - Still must pay ESA termination /severance pay

Employer's Right to Medical Information

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Employer's Right to Medical Information

- Level of information will vary depending upon situation
 - Generally, entitled to information explaining absences
 - Union vs. Non-Union
 - Greater right to medical info regarding a prolonged absence with a particular focus on prognosis for future
- WHY? Employee has an obligation to provide info to demonstrate a satisfactory reason for absenteeism

Employer's Right to Information

- Purpose – to understand restrictions, prognosis, duration, abilities.
- Necessary to:
 - Determine if there is a disability
 - Fulfill JOINT obligations of accommodation
- NOT entitled to Diagnosis
 - Different issues where Employer is adjudicating own disability insurance

Medical Explanations

- Insufficient doctor's notes:
 - do not accept if provides no relevant info
 - Eg. "Saw patient today and he informs me he had a migraine last Tuesday"
- Request MORE medical info!
- Timely manner
- Importance of policies, procedures and consistency!

Challenging Medical Evidence

- Medical exam by employer selected doctor only if expressly provided in contract or by statute
- Request supplementary medical info:
 - be specific
 - request specialist if appropriate

Workplace Violence & Harassment

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Bill 168 and "Zero Tolerance"

Quality Meat Packers Limited v U.F.C.W., Local 175 (2013 CanLII 15073 (ON LA))

- Grievor assaulted a co-worker and supervisor
- Discharged
- Arbitrator Surdykowski upheld the discharge
- However, he also stated that the passage of Bill 168 does not mean that discharge is appropriate in *every* case of workplace violence
- Arbitrators still must balance competing labour relations interests when determining the appropriate penalty

Bill 168 and "Zero Tolerance"

C.E.P., Local 1178 v. Hood Packaging Corporation (2013 CanLII 35534 (ON LA))

- Grievor was discharged for threatening to stab a co-worker
- Arbitrator Trachuk held that the amendments to *OHSA* did not mean that discharge was always appropriate
- Arbitrators still must balance seriousness of the conduct against any mitigating factors
- In light of the grievor's 24 years of service and clean disciplinary record, grievor was reinstated with back pay

Workplace Violence and Harassment

Vale Canada v. USW, Local 6500 (September 20, 2013) (Kaplan)

- Three employees grieved their termination for assaulting a co-worker who had returned to work during a strike
- In light of the grievors' refusal to acknowledge their actions and their dishonesty during the proceedings, Arbitrator Kaplan found that the termination was the appropriate penalty in the circumstances

Workplace Violence and Harassment

ATU v. Toronto Transit Commission,
[2013] O.L.A.A. No. 505 (Shime)

- Employee discharged for uttering threat against CEO
- Previously discharged for violence, but reinstated
- Union and employee have obligation to maintain a civil workplace
- Discharge upheld

Workplace Violence and Harassment

Windsor (City) v. C.U.P.E, Local 543 (July 4, 2013) (Goodfellow)

- City employee was terminated for, among other actions, making "threatening or menacing sounding statements" on four occasions over a ten day period
- Arbitrator found regardless of whether the grievor intended to act on the statements, discharge was warranted in the circumstances

Workplace Harassment: Reprisal Complaints

Conforti v. Investia Financial Services Inc. (2011 CanLII 60897 (ON LRB))

- Worker alleged that he was terminated after complaining of workplace harassment
- Board commented that it did not have the statutory authority to consider reprisal complaint
- BUT...two recent decisions bring this approach into question

Workplace Harassment: Reprisal Complaints

Ljuboja v. Aim Group Inc. (2013 CanLII 76529 (ON LRB))

- Vice-Chair Nyman found that *Investia* did not conclusively determine the scope of the Board's powers
- He found that the obligation to create and implement workplace harassment policies must mean that employees should be free to make complaints without fear of reprisal

Workplace Harassment: Reprisal Complaints

Abick v. Ministry of Government Services (Ontario Government) (2013 CanLII 76546 (ON LRB))

- Allegation that employer failed to include mandated harassment policies and failed to properly investigate a workplace harassment complaint
- Relying on *Investia* employer brought a preliminary objection
- Case allowed to proceed
 - Distinguished the case at hand from *Investia* on the basis that it dealt with the sufficiency of the employer's policies rather than a reprisal complaint

Conclusions and Q & A

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