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CRAWFORD CHONDON & PARTNERS LLP

Management Labour and Employment Lawyers

THE EMPLOYERS' Edge

IN THIS ISSUE

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McGuinty Proclaims New "Family Day": Employees Rejoice, Employers Express Concern

Recently, Premier Dalton McGuinty celebrated his re-election by instituting a 9th statutory holiday. Family Day will take place on the third Monday in February, beginning February 18, 2008.

This new statutory holiday will have significant cost implications for Ontario employers. The potential cost to employers of this additional paid holiday has been estimated by economists and business leaders as anywhere from $500 million to $2 billion, when considering holiday pay to be disbursed and/or overtime pay for those companies which operate on that day.

The anticipation of the new holiday has also raised certain issues including whether employers are required to give their employees a day off with pay on Family Day if the holiday is not included in their collective agreement's or employment contracts/policies. Under the *Employment Standards Act, 2000* ("ESA"), Family Day will apply to every provincially regulated employer and employee in Ontario, except those expressly excluded. However, the good news for employers is that subsection 5(2) of the ESA stipulates that if one or more provisions in a collective agreement or employment contract/policy provides a "greater right or benefit" to employees than what's required under the ESA, the collective agreement or employment agreement provisions will apply instead. In other words, if an employer is able to demonstrate that its collective agreement or employment contract/policies provide benefits with respect to public holidays that are superior to the total amount of public holiday entitlements provided in the ESA, the employer may not be required to provide a particular paid public holiday to its employees.

In this regard, employers should consider the entirety of the terms contained in either a collective agreement or employment contract/policies, as case law demonstrates that simply comparing the number of holidays provided is not adequate consideration of the issue. Some factors to consider include the number of paid holidays provided; the eligibility for entitlement; the premium holiday rates; and the overall flexibility of the holiday provisions.

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If employers do not provide their employees with a greater right of benefit in terms of paid holidays, they should seek advice to determine whether the terms of their employment agreements, policies or collective agreements allow them to substitute Family Day for an existing floater holiday. A misapplication of such a substitution could expose an employer to liability for holiday pay, premium pay and/or additional time off for affected employees. Additionally, as with any significant change to terms and conditions of employment, proper notice to employees is required before such a change is made. Finally, employers should weigh the cost savings of making such a substitution against the potential impact on employee morale of taking away a perceived entitlement.

Hold The Date!

Crawford Chondon & Partners LLP is pleased to announce its:

6th annual

Labour & Employment Law forum

October 21, 2008

Don't miss this opportunity to be updated on the latest labour and employment law developments. Our seminar will feature informative panel sessions and interactive workshops on a whole range of "hot" topics that matter to your workplace.

Are You At Risk For An "Unpaid Overtime" Claim?

Some employers hold the misconception that overtime need not be paid to salaried "white collar" employees. Recent class-action lawsuits, including claims against CIBC for $600 million and Scotiabank for $350 million vividly demonstrate the dangers of this misconception.

Following the trend of similar lawsuits in the United States, these two separate actions seek compensation for thousands of employees across Canada. The employees allege that through scheduling after-hours meetings, understaffing, failing to provide promised time-off in lieu, and other practices, they are forced to work overtime for which they are not compensated.

Banks are regulated under the *Canada Labour Code*, which requires employers to pay employees at 1.5 times their regular rate for any hours over 40 that they work in a week. However, most employers are regulated by the *Employment Standards Act, 2000* ("ESA"), which requires employers to pay employees at least 1.5 times their regular rate of pay for hours worked in excess of 44 per week. There are exemptions to these general requirements for certain employees including for managerial employees. However such managerial employees must truly have managerial authority as required by the Regulations of the ESA.

The reality of today's business world, especially in a non-unionized setting, is that flexibility in work scheduling is valuable for both employers and employees. However, employers may be hesitant to use any type of flexible scheduling if it means exposure to claims for unpaid overtime somewhere down the road.

Fortunately there are a few relatively straightforward measures employers can take that will provide them with a certain amount of flexibility and limit potential liability. If an employee, or group of employees, is on an irregular schedule, it may make sense to ask those employees to enter into overtime averaging agreements that provide for overtime to be averaged out over a period of two or more weeks for the purpose of calculating overtime pay. Likewise, excess daily and weekly-hours agreements can allow employers to schedule, and employees to work, an amount of hours that legislation may otherwise prohibit. So long as the specific requirements for these agreements are met, employers can achieve the flexibility that they need while at the same time remaining in compliance with statutory obligations.

In sum, if employers decide to not pay overtime to a certain class of employees they should first seek advice to determine whether this class is exempt from overtime eligibility under the ESA and, in the case of managers, whether they are managerial for the purposes of employment standards legislation. If employees are determined to be subject to overtime entitlements, employers should assess whether or not they wish to prepare averaging agreements. Accordingly, while employees should take the recent class-action lawsuits as a warning to review scheduling and staffing practices, they should also note that certain compliance strategies may not be as onerous as one may fear.

Divisional Court Gets Back To Basics

In a recent appeal, the Divisional Court reiterated that the basic elements of a contract must still be present for employment obligations to arise. These basic elements are offer, acceptance and consideration. While, to some, this may seem like a simple confirmation of the state of the law, the decision from which this appeal was launched had stretched the application of these basic principles, prompting the question: Does an imputed intention to offer employment either constitute or take the place of a valid offer?

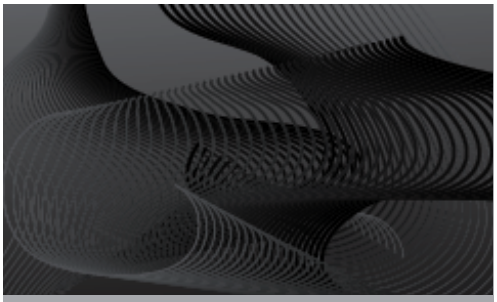
The trial judge found the following facts: Ms. Salazar was laid off in July 2004. On the Friday just before the expiry of her statutory layoff period, the employer sold its assets to a new company. Employees who were at work before the sale attended work on Monday and subsequently received letters from the new employer advising of the sale and offering employment. Each letter included a designated signing line for employees to indicate their acceptance. Ms. Salazar neither returned to work nor received any such letter. The sale of the company was not communicated to Ms. Salazar, and she ultimately sued the new company for wrongful dismissal.

In allowing Ms. Salazar's claim, the trial judge decided that the employer had not meant to treat her differently from other employees. The judge found that, despite the fact that Ms. Salazar's statutory layoff period had expired, the new employer had "…intended to offer continuing employment." Further, the trial judge found that "[Ms. Salazar]'s conduct in continuing to deal with the defendants clearly…constitute[d] acceptance of this arrangement."

The new company appealed this decision on the grounds that the trial judge had erred in law when she found that an intention to offer employment was capable of acceptance so as to constitute a contract of employment. In a succinct judgment, the Divisional Court overturned the trial decision, reiterating the basic premise of contract formation: "To create a contract there must be an offer of employment, acceptance, and consideration." The court went on to state:

> "No authority was cited here or below for the proposition that a prospective employer's intention to offer employment, not made to the prospective employee, can be impliedly accepted by the prospective employee, notwithstanding she was unaware of it, so as to create a contract of employment."

The Divisional Court's decision to not stretch the fundamental principles of contract law is a welcome one. It confirms that employment is still, in its essence, a contract and that an employer cannot be found to unwittingly enter into an employment agreement without ever extending an offer.



Events

January 23, 2008
Laura Williams

Stratford & District Human Resource Association (SDHRA) "Dealing with Difficult Terminations"

January 30, 2008
Susan Crawford & Justin Diggle

The Brampton Board of Trades "Public Holiday Entitlement, The Introduction of Family Day"

January 31, 2008
Kelsey Orth

Greater Kitchener Waterloo Chamber of Commerce "Performance Management & More"

February 5, 2008
David Chondon

Ontario Bar Association "Critical and Emerging Issues in a Labour and Employment Practice"

March 26, 2008
Karen Fields

Stratford & District Human Resource Association (SDHRA) "Bullying in the Workplace"

Ontario Government Introduces Legislation To Ensure Job Protection For Reservists

The McGuinty Government has recently introduced proposed legislation that, if passed, will provide job-protected leave for military reservists who are on tours of duty either at home or abroad. As it currently stands, military reservists are not protected by legislation which ensures that they can return to their pre-leave jobs or a comparable job with the same employer, when a tour of duty is completed.

In order to qualify for a job-protected leave, a reservist must have worked for his or her employer for at least six consecutive months. Under the proposed legislation, all employers covered by the *Employment Standards Act, 2000* ("ESA"), regardless of their size would be required to provide the leave to eligible employees. Reservists entitled to a leave would also be protected for the period necessary to engage in the operation they are deployed to. For reservists who are deployed to international operations, this would include any pre-deployment or post-deployment activities required by the Canadian Forces.

Under the proposed legislation, if a reservist is requesting a leave, reasonable notice must be provided to the employer, in writing, before beginning and ending the leave. Proof of service may be required if requested by the employer. The proposed legislation also allows employers to postpone the reservists' reinstatement up to the later of two weeks or one pay period.

In addition, while on a leave period, reservists' seniority and length of service credits would continue to accumulate. However, during the leave, an employer is not required to pay the reservist and pension or benefit plans would not be required to continue. The exception to this, however, is where the employer chooses to postpone the return date it is then required to make benefit contributions during this additional period of time.

Upon the reservist's return from leave, the employer would be required to reinstate the reservist to the same position if it still exists, or to a comparable position if it does not. In the case of a breach of the proposed legislation in non-unionized workplaces, the Ministry of Labour Employment Practices Branch would enforce the proposed legislation in the same manner and with the same remedies as would be the case for violations of other leave provisions under the ESA. In unionized workplaces, enforcement would take place under the applicable collective agreement.

Although the legislation has not yet been passed, it would be wise for employers to give some thought to including a military leave policy which stipulates among other things, the length of the leave and how much notice the employer would require.

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Pre-Access Drug Testing Allowed Safety-Sensitive Workplaces

The topic of employee drug testing has been a hot-button issue in Canada for some time, pitting the safety concerns of the employer against the privacy concerns of employees. However, while drug testing by employers has been allowed in some cases, there have been strict restrictions imposed by arbitrators on when employers can test, and what they can test for. However, a recent arbitral decision out of Alberta involving a number of unions, a large construction company and an oil company ("*Bantrel*"), and a recent Ontario Divisional Court decision involving a large lumber company ("*Weyerhaeuser*") may have shifted the focus further towards the safety side of the equation.

Historically, the arbitral jurisprudence has been fairly clear that employers can only test an employee or group of employees in order to determine impairment, where there is reasonable cause, or after an incident has occurred. In *Bantrel*, the unions argued that the only reason to put a drug-testing policy in place is to measure impairment, which the type of pre-access testing which was at issue in that case, did not do. Therefore, the unions asserted that the testing policy imposed by the employer was an unreasonable intrusion into the employees' privacy.

However, Arbitrator Phyllis Smith, writing for the Board, said that the unions' argument "…ignores the reason for the rule, which is risk management. …In an era in which employers are subject to increasingly severe penalties for workplace safety incidents, and employees understandably look to the employers to make and enforce rules to protect their safety on the worksite, risk identification and management is of necessity an essential part of an employer's operating responsibilities."

Moreover, in rejecting the application of previous case law (particularly, the Ontario Labour Relations Board decision in *International Union of Operating Engineers, Local 793 v. Sarnia Cranes Ltd.,* with respect to only testing after an incident has occurred, Arbitrator Smith said: "There is no necessity to wait for a potentially serious problem to arise before adopting risk management strategies." Smith held that the principles espoused in the cases cited by the unions did not apply to safety-sensitive workplaces.

The common-sense approach taken by Ms. Smith and the Arbitration Board in *Bantrel* is a welcome change to the status quo with respect to drug testing, especially where safety-sensitive workplaces are concerned. However, it should be noted that even where circumstances call for pre-testing, such pre-testing programs must use reliable testing methods and must be reasonable in terms of consequences. In *Bantrel*, the policy was reasonable because: 1) it provided a two-month warning for employees, and therefore was not "random"; and 2) it did not provide for automatic termination in the event of a failed test, but instead resulted in individualized assessment and counseling, with the ability to gain access to the job site afterwards.

In *Weyerhaeuser*, similar reasoning found the employer's policy to be sound, albeit in a different context. The Complainant, Chornyj, had been offered employment in a safety-sensitive position with Weyerhaeuser. According to Weyerhaeuser's policy, the offer of employment was conditional on Chornyj passing a drug test. Chornyj tested positive for marijuana and was asked about his use of the drug. His initial answer was to hesitate then deny any use, but eventually he admitted to recreational use of the drug. Chornyj's offer was withdrawn as a result. Weyerhaeuser stated that its decision to withdraw the employment offer was due to Chornyj's dishonesty and not on the positive test. Chornyj filed a complaint with the Ontario Human Rights Commission, alleging discrimination on the grounds of actual or perceived disability. The Commission referred the complaint to the Tribunal. The Tribunal found in favour of Chornyj and Weyerhaeuser appealed to the Divisional Court.

In examining the first issue, the Court rejected Chornyj's claim that he was discriminated against on the basis of actual disability. He had never claimed to be an abuser of the drug therefore it was inconsistent to claim to be discriminated against on the basis of an actual disability.

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On the issue of perceived disability, the Divisional Court found that neither Weyerhaeuser representatives nor its employees subjectively perceived Chornyj to be disabled, nor did the consequences of Weyerhaeuser's policy support an inference that the company perceived Chornyj as having a disability. The Court upheld the policy due to its flexibility and accommodation. In particular, the policy was not applied mechanistically but instead required an examination of each particular instance of a positive test. Second, a positive drug test did not automatically lead to dismissal or to the revocation of an offer of employment.

The lawyers at Crawford, Chondon & Partners will continue to monitor the developments in this important area of the law.

Announcements

The lawyers and staff at Crawford Chondon & Partners LLP are pleased to welcome **Kelly M. McDermott** as Associate lawyer.

Termination Of Employment During Organizing Drive Entitles Union To Automatic Certification

In a 2004 edition of the *Employer's Edge*, we reported that the Ontario *Labour Relations Act*, 1995 (the "Act") had been amended to restore the Ontario Labour Relations Board's former power to automatically certify a union where it finds that an employer has committed a serious breach of the Act. Recently, the Board released its first decision pursuant to this amendment, which granted automatic certification.

Section 11 of the Act provides that where an employer's contravention of the Act has the effect of preventing employees from expressing their true wishes in a representation vote, or where it prevents the union from demonstrating that at least 40 per cent of the proposed bargaining unit were members of the union at the time the certification application was filed, the Board can certify the union as the bargaining agent when no other remedy for the employer's breach of the Act would be appropriate.

In *United Brotherhood of Carpenters v. Swing Stage Equipment Rentals*, the Union alleged that the employer committed an unfair labour practice when it terminated the employment of an employee who was attempting to organize employees in order to become members of the Union. The Union was ultimately unable to show that at least 40% of the proposed bargaining unit at the employer's workplace consisted of Union members, a requirement that is necessary under the Act in order to hold a union representation vote. The Union alleged that this was a result of the employer's dismissal of the organizer.

Disbelieving the employer's evidence that the employee had been dismissed for performance reasons, the Board found that he had been dismissed because he was involved with organizing the Union at the workplace. As a result, the Board found that the employer had committed an unfair labour practice. Further, the Board found that the employees could not be expected to freely exercise their choice to become Union members because they would have been reasonably intimidated by the dismissal.

As a result, the Board found that the only appropriate remedy in the circumstances was to certify the Union as the bargaining agent of the employer's employees, without holding a representation vote. In this regard, the Board has confirmed its approach under previous versions of the Act to generally certify unions where an employer's contravention of the Act is a result of a termination of employment for union activity or involvement.

The message for employers as a result of the *Swing Stage* decision is to carefully consider whether a termination of employment during a union organizing drive is absolutely necessary and appropriate from a business perspective. The Board has shown that it will strictly construe such a termination to be related to union activity if it occurs during or shortly after a union organizing campaign. The result could be severe; that being the certification of a union where employees have otherwise not signed on to be members of the union, and in the absence of a representation vote to confirm employee wishes.

New Wage Protection Law: Employer Bankruptcy And Insolvency

On December 14, 2007, Royal Assent was given to a parliamentary bill which will modernize the *Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act* (CCAA), as well as create the legislative framework for the Wage Earner Protection Program (WEPP).

The central purpose of WEPP is to provide protection to employees who become unemployed by bankruptcy or receivership, and who have outstanding wage payment claims against their employer at the time the bankruptcy or receivership is declared. It is important to note, however, that not all individuals will qualify for payment through WEPP. Employees who have worked three months or less, or who are officers, directors, owners or and managers are not eligible to receive payment under the Program. The WEPP will be funded by the Consolidated Revenue Fund.

The introduction of the WEPP will also have a significant impact for insolvent employers who are unionized. The amendments specify that a debtor company can seek a Court order authorizing it to serve a "notice to bargain" on the bargaining agent representing its employees, which would trigger a renegotiation of the collective agreement under the applicable labour legislation. To obtain an order, the company has to satisfy the Court that an order is necessary for a restructuring of the company, that it has made legitimate efforts to renegotiate the collective agreement with the union, and that the failure to do so would lead to irreparable harm to the employer. The existing collective agreement will remain in force unless it is changed by agreement between the parties. Where a collective agreement is revised, the bargaining agent may make a claim, as an unsecured creditor, for an amount equal to the value of the concession.

Super Priority for Unpaid Wage Claims

Under the old insolvency regime, employees' wages and vacation pay ranked lower than unpaid suppliers of goods, certain Crown claims, secured creditors, and the legal and administrative costs of the bankruptcy. As a result, many employees seldom received payment for their unpaid wage claims.

In an attempt to better ensure that employees are able to recoup a portion of their wages, the *Bankruptcy and Insolvency Act* has enacted a "limited super-priority" for unpaid wage claims, which ranks ahead of secured creditors over current assets such as cash, accounts receivable and inventory. Regular pension plan contributions by employees and their employers that are unremitted at the time of bankruptcy or receivership will also have priority status, ranking above secured creditors.

The super-priority system also works in tandem with the WEPP by shifting the responsibility on the government to assume the interests of wage earners against the insolvent employer. It is estimated that the government will recover up to 50 cents on the dollar with the new limited super priority. Human Resources and Social Development Canada anticipates that the super-priority will deter employers from failing to pay workers as the government will now be responsible for ensuring payment. It is also anticipated that by giving priority to unpaid wage claims, secured creditors will now have an interest in ensuring that employers meet their payroll obligations, in order to prevent the accumulation of unpaid wage claims that may interfere with the secured interest.

Finally, the WEPP requires trustees and receivers to perform duties to support the operation of the Program, some of which include:

- Identifying all employees who are owed wages and compensation within six months of the declaration of bankruptcy or receivership;
- Determining the amount of wages and compensation owing to each individual in respect of those six months;
- Informing each affected employee about the WEPP and the conditions under which payments may be made;
- Providing the designated Minister with information about which employees are affected and the amount of wages and compensation they are each owed under the WEPP; and
- Informing the designated Minister once they have been discharged from their duties as trustee or receiver.

Although the Act has recently received Royal Assent, it will likely be some time before the Act comes into force, given that the Department of Labour will need time to set up the WEPP, including infrastructure development, staff training and the preparation of the WEPP Act regulations. Crawford Chondon & Partners LLP will continue to monitor the implementation of this significant legislative initiative.

Determining Undue Hardship: Supreme Court Of Canada Appears To Raise The Bar

In 2000, Via Rail paid $29.8 million dollars to purchase 139 rail cars that were designed and manufactured in Europe. The cars were purchased at a significant discount and Via Rail had budgeted an additional $100 million dollars to prepare the equipment for service. The acquisition would permit VIA to revitalize its struggling operation at a relatively economical cost.

The Council of Canadians with Disabilities ("CCD") complained under the *Canada Transportation Act* (the "Act") that the newly purchased rail cars lacked accessibility for disabled persons. The CCD specifically complained that 46 features of the purchased rail cars constituted "undue obstacles" to the mobility of disabled persons, in contravention of the Act, and requested the Canada Transportation Agency to make orders to remove the obstacles.

Under the Act, transportation providers are obliged to remove such undue obstacles, "as far as practicable".

While the analysis in this case is specific to the transportation industry, it is analogous to the undue hardship analysis that is applicable to questions of disability accommodation in the employment context.

As a result of the Supreme Court of Canada's landmark 1999 decision in *B.C.G.S.E.U. v. Meiorin*, an employer who adopts a standard or rule in its workplace that has the effect of discriminating against a disabled employee, can justify that standard only to the extent that it cannot accommodate the disabled employee without incurring undue hardship.

In the VIA case, the Canada Transportation Agency found 14 obstacles which it classified as undue and ordered VIA to implement various remedial measures. VIA's estimation was that the cost of these remedial measures would be between $48 million and $92 million. VIA appealed the Agency's decision to the Federal Court of Appeal which overturned the Agency.

The Agency appealed and the Supreme Court of Canada ultimately agreed with the Agency's original decision, overturning the Federal Court decision. The Court found that although the Agency did not apply the *Meiorin* decision in a step by step fashion, a standard equivalent to the *Meiorin* standard was applied and the rather expensive remedy imposed by the Agency was appropriate.

The *VIA* case appears to set a high threshold for the accommodation of persons with disabilities in the transportation context. It remains to be seen whether it will have a significant impact on employers, or be confined to the transportation sector. Nevertheless, the decision may be taken as a signal from the highest court in the country that the bar for determining undue hardship, particularly where the cost of accommodation is concerned, has been raised yet again.

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