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IN THIS ISSUE



The Employers' Edge

SPRING 2005

# New Hours of Work, Overtime and Emergency Leave Rules In Force in Ontario

*Effective March 1, 2005, Bill 63, entitled the Employment Standards Amendment Act (Hours of Work and Other Matters), 2004, has changed the Employment Standards Act, 2000 ("ESA") with respect to excess hours of work agreements and overtime-averaging agreements. However, what is less well known is that Bill 63 also amends the ESA's provisions with respect to emergency leave.*

## Hours of Work and Overtime

Under the former provisions of the ESA, employees could agree in writing to work more than eight (8) hours per day or the employee's regular work day if it was more than eight (8) hours ("daily maximum"), and these agreements did not require approval from the Director of Employment Standards (the "Director"). Employees could also agree in writing to work more than forty-eight (48) hours per week ("weekly maximum") and, so long as the hours worked did not exceed sixty (60), such agreements did not require the Director's approval. Further, without the Director's approval, employees could agree in writing to have their working hours averaged over periods of up to four (4) weeks for the purposes of determining their entitlement to overtime pay, if any.

Bill 63 changes these provisions in significant ways. Written agreements to work hours in excess of the weekly maximum (i.e. 48 hours) will not be valid unless the employer has obtained Director approval. In addition, in non-unionized workplaces, agreements to exceed either the daily or weekly maximums will not be valid unless the employer has given the employee a government issued "Information for Employees About Hours of Work and Overtime Pay" document before the agreement is made, and the employee has acknowledged in the agreement that he or she received this document.

Bill 63 also creates new overtime averaging periods of "two or more consecutive weeks". While employees may still agree in writing to average their hours over these periods, these agreements will be valid only if the Director approves of them.

Bill 63 contains a number of technical provisions regarding the treatment of existing excess hours and overtime-averaging agreements. In a nutshell:

1. Existing agreements to work excess daily hours that were entered into under the old rules prior to March 1, 2005, shall continue to be valid so long as on or before June 1, 2005 the employer provides the employee with the "Information for Employees About Hours of Work and Overtime Pay" document.

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## Upcoming Events

### April 2005

**5th** **David Chondon**

***Union Organizing and Fair Dealing With Your Employees***

Ottawa

**27th** **Justin Diggle**

***Absenteeism and the Duty to Accommodate***

**Affinitas Spring 2005 Seminar**

Cambridge Holiday Inn

***Please contact us should you wish further details about the above-listed events.***

## Announcements

**We are pleased to welcome the following new staff members to the Crawford Chondon and Andree LLP team:**

**Loretta Lockyer, Receptionist**

**Sophie Qui, Office Administrator**

**Jennifer Young, Assistant**

# New Hours of Work, Overtime and Emergency Leave Rules In Force in Ontario

***(continued from page 1)***

2. Existing agreements to work excess weekly hours that were entered into under the old rules prior to March 1, 2005, will only be valid if the employer seeks the Director's approval for same, and on or before June 1, 2005 the employer provides the employee with the "Information for Employees About Hours of Work and Overtime Pay" document.

3. Existing Director's approvals for weekly hours of work in excess of 60 that were obtained under the old rules prior to March 1, 2005 are void as of March 1, 2005.

4. Existing overtime averaging agreements that were entered into under the old rules prior to March 1, 2005 will only be valid if the employer seeks the Director's approval for same.

5. Existing Director's approvals for agreements to average overtime over more than four (4) weeks that were obtained under the old rules prior to March 1, 2005 are void as of March 1, 2005.

Bill 63 outlines how hours may be scheduled and overtime hours may be calculated while the Director's approvals are pending. Bill 63 also requires employers to retain copies of excess hours and overtime-averaging agreements for three (3) years after the last day that work was performed under them.

## Emergency Leave and "Other Matters"

Bill 63 amends subsection 50(5) of the ESA, to provide that employees of employers who regularly employ 50 or more employees, are entitled to 10 days of leave without pay "in each calendar year" where the employee is suffering from a personal illness, injury or medical emergency, or where an enumerated family member of the employee has died, is ill, injured, is suffering a medical emergency, or is involved in an "urgent matter."

Previously, the section gave employees 10 such days "each year". In a well-reasoned decision dated December 3, 2004, Ontario Labour Relations Board Chair Kevin Whitaker held that "each year" within the meaning of section 50 meant the period of 365 (or 366) days from the start of the employee's employment, not a "calendar year". This decision has, however, been overruled by the Bill 63 amendment.

In our opinion, it is unfortunate that the government did not adopt Mr. Whitaker's position. Given the Bill 63 amendment, employees are now entitled to 10 days of Emergency Leave per calendar year, regardless of whether they were hired on January 21st or December 21st. We would echo the argument of the employer in Mr. Whitaker's decision, that an employee who is hired on December 21, 2005 and who satisfies the requirements of section 50, could take 20 consecutive days of unpaid leave without having to work a single day (10 emergency days for 2005 and 10 for 2006).

Finally, as of March 1, 2005 the Ministry of Labour can publish, including via the Internet, the names of companies and individuals convicted of an offence under the ESA and information about the offence itself.

Ontario employers likely have a number of questions surrounding the effects of these new provisions, particularly with respect to existing excess hours and overtime-averaging agreements. The lawyers at Crawford, Chondon & Andree LLP would be pleased to discuss any concerns that employers may have, as well as to assist them in developing compliance strategies in their workplaces.

# Another Stop on *OC Transpo*

The Federal Court recently released a highly anticipated decision, which reviewed two 2003 decisions of the Canadian Human Rights Tribunal (the "Tribunal") that had raised concerns throughout the employer community. Most aspects of the Court's decision are very encouraging for employers who are dealing with chronic employee absenteeism.

In 2003, the Tribunal decided that OC Transpo's dismissals of bus operators, Alain Parisien and Francine Desormeaux, for excessive innocent absenteeism discriminated against them on the basis of disability, contrary to the Canadian Human Rights Act (the "Act").

In its recent decision, the Court appeared to elevate the nature of evidence that a claimant must present in order to establish that he or she suffers from a disability within the meaning of the Act. To explain, the Tribunal relied on the evidence of a family physician to find that Ms. Desormeaux suffered from migraine headaches, and that such headaches constituted a disability. On review, the Court held that, unlike a neurologist, a family physician was not qualified to give an opinion that the claimant suffered from migraines. Accordingly, there was no valid evidence that Ms. Desormeaux suffered from migraines and, therefore, there was no evidence that she suffered from a disability. Given this result, the Court did not consider Ms. Desormeaux's case further in its decision.

With respect to Mr. Parisien, the Tribunal accepted a psychiatrist's evidence that there may have been a relationship between Mr. Parisien's Post-Traumatic Stress Disorder and other mental and physical ailments that he suffered. On review, the Court appeared to suggest that a psychiatrist may not be qualified to give such evidence. However, the Court did not believe that the Tribunal's error in this regard materially affected the decision it ultimately reached in the case.

The Court also gave judicial recognition to a principle that is already firmly entrenched in arbitral case law. For some time, arbitrators have imposed upon on employees, the responsibility of advising their employers that they had a disability and required accommodation. The Court found that Mr. Parisien failed in this duty.

Finally and most importantly, the Court rejected the Tribunal's finding that OC Transpo failed to accommodate Mr. Parisien to the point of undue hardship.

**The duty to accommodate does not require the employer to tolerate a "horrendous level of absenteeism."**

In a nutshell, at the time of his dismissal the prognosis for Mr. Parisien's regular and reliable attendance at work in the long term was poor. Accordingly, in OC Transpo's view the only possible form of accommodation for Mr. Parisien would have been to tolerate a high level of absenteeism. The question was whether this was an acceptable form of accommodation.

## The Tribunal said yes:

"Certainly, all employers must be prepared to accept some level of absenteeism from all employees as it is inevitable that they will be unable to attend their work from time to time. The issue to be decided is whether this 'tolerance' of a certain level of absenteeism would impose undue hardship on the employer…"

According to the Tribunal, Mr. Parisien could have been placed on OC Transpo's "spare board"; a list of drivers who were available to replace absent workers as the need arose. The Tribunal also found that OC Transpo failed to ask Mr. Parisien's medical advisors whether or not he would be able to perform employment other than as a bus operator.

On review, the Court recognized that OC Transpo had accommodated Mr. Parisien a great deal in the past, by allowing him to maintain his employment and by re-assigning him to modified hours and modified duties. Furthermore, the Court appeared to suggest that tolerating continued excessive absenteeism was not a reasonable form of accommodation. Instead, such a requirement would impose undue hardship. The Court stated:

"The factual context here is the employment relationship. That relationship is subject to the Act, but the fact remains that the nature of the bargain between the parties is that the employee will appear for work on a regular and reliable basis and the employer will pay for the service. Excessive innocent absenteeism has the potential to nullify that relationship…there comes a point when the employer can legitimately say that the bargain is not completely capable of performance. The record here shows a horrendous level of absenteeism from the time Mr. Parisien began his employment with the employer. The absenteeism of 1,644 days and 33 part days is only a portion of the absenteeism that is from 1984 to February 1996. That appears to be a rate in excess of 3,090...It is not reasonable...to require the employer to tolerate this."

Clearly, this reasoning is beneficial for employers, in that it is consistent with the arbitral principle that at some point, excessive innocent absenteeism may justifiably lead to a dismissal. However, we would advise employers to exercise some caution in relying too heavily on this portion of the Court's decision. Given the brevity of the Court's reasons and the fact that the duty to accommodate is generally given a greater deal of analysis than the Court gave it in this case, we would not be surprised if this decision is appealed.

# What's New in Occupational Health and Safety?

## Tickets for Unsafe Work

Effective January 15, 2005, Ministry of Labour Health and Safety Inspectors began issuing tickets to employers, supervisors and workers in the Industrial Sector if they observe unsafe practices. These tickets have already been in place in the construction, mining and diving sectors and have now expanded into the Industrial Sector. Tickets could carry fines in the range of $200.00 to $300.00.

## Proposed Changes to OHSA

Two new private members' bills have been introduced: Bill 126 by M. Churley of the New Democratic Party and Bill 131 by L. Broten of the Liberal Party. Both Bills propose amendments to the OHSA to include the concepts of "sexual harassment" and "workplace-related harassment". These proposed amendments would require changes to be made to employers' obligations to maintain a workplace free from harassment. We will be following the progression of these Bills and will provide updates in upcoming editions of *The Employers' Edge*.

## Proposed Changes to Industrial Regulations

Three potential regulation changes to the Industrial Programs are still outstanding. The three panels of the Minister's Health and Safety Action Group identified ergonomics as an issue to be addressed, and asked the Minister to consider implementing specific regulations with respect to same. The Government of Ontario has now set up an advisory group with respect to ergonomics and reducing workplace injuries. This ergonomics working panel will look at reducing workplace injuries by 20% by 2008. This panel will assess best practices, policies and enforcement options for addressing causes of injury. As well as the manufacturing sector, the panel's review will focus on industrial, automotive, retail, and restaurant businesses.

# Remedy of Binding Arbitration Reversed

In the Spring 2004 edition of the *Employers' Edge*, we discussed a noteworthy decision of the Canada Industrial Relations Board (the "CIRB") in a case involving TELUS Communications Inc. The CIRB found that TELUS had committed unfair labour practices during collective agreement negotiations and, as a remedy, ordered TELUS to offer to the Telecommunications Workers' Union binding arbitration to resolve any outstanding items in those negotiations. Such a remedy is not specifically authorized by the *Canada Labour Code*, and is more severe than the remedy imposed in the 1993 *Royal Oak Mines* decision, a case that dealt with the most acrimonious collective bargaining relationship Canada has witnessed to date.

We are pleased to advise that on February 2, 2005, the CIRB, amongst other things, annulled the order requiring TELUS to offer binding arbitration to the Union. Although the CIRB has not yet provided any detailed reasons for this decision, federally regulated employers should be somewhat reassured. The CIRB now appears to be less inclined to take the extraordinary step of terminating collective bargaining between parties, and ordering employers to offer binding arbitration to resolve collective bargaining disputes.

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# Tips for Increasing your Effectiveness as a Manager

People are central to the success of every organization. In some organizations, you will have the benefit of an HR advisor, but sometimes not. Either way as Manager, you often end up dealing with a wide range of people issues. So, how can you ensure you are managing people in the best way possible and getting the most out of your team members?

Here are some practical tips which you can use immediately to increase your effectiveness as Manager:

**Know yourself and your management style:** An appraisal of your strengths and weaknesses will certainly help you be an effective Manager. The more you know yourself, your management style and how you react under different situations, the better you can deal with people issues.

**Know the values of the Company:** You are the interface between the organization and employees. You should understand the organization's mission and values, and should consider how your dealings with team members help achieve the organization's goals.

**Stay informed:** It is crucial that you know the basics of the Company's HR policies and procedures. This knowledge provides you with a managerial framework, and is essential for dealing with people-related and HR-related issues. If you currently do not have this framework in place, then consider introducing the basics (i.e. discipline, performance management, leaves of absence and time off (including sick leave), security, harassment, code of professional conduct, etc.).

**Inform employees:** Ensure key policies, procedures, and work responsibilities are circulated and understood. You will need to be able to communicate Company principles clearly and consistently.

**Utilize your peers:** Make time to build and develop relationships with your peers so that when you require assistance, you have somewhere to turn. The earlier you seek advice, the more likely you are to reach a positive result.

**Remain objective:** When faced with people issues, many are drawn into personal or political agendas. One of the hardest things for any Manager to do is to remain objective. Try to avoid taking sides until it is absolutely essential. Do not act out of anger or out of fear, but take time out until the situation has defused.

**Keep your promises:** Everyone will be watching how you deal with situations, so do not make promises you can not or do not intend on keeping.

**Listen:** Managing is about connecting with employees. Keeping up a regular dialogue with employees and maintaining open channels of communication will benefit your team. The aim of contact with employees should be to build empathy and self-esteem and provide support. By staying connected, without being over bearing or controlling, you are more likely to identify issues well before they become a problem.

**Maintain confidentiality where appropriate:** It is essential to always keep confidentiality in mind when speaking or corresponding with employees.

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***"The Employers' Choice"***




# "Butting Out" in Ontario Workplaces

*The Ontario government has introduced tough new anti-smoking legislation. Bill 164 includes a host of amendments to the Tobacco Control Act, 1994 (which will be renamed the Smoke-Free Ontario Act), and proposes to repeal the current Smoking in the Workplace Act. The relevant portions of Bill 164, from an employer's perspective, are scheduled to come into force on March 31, 2006.*

The *Smoking in the Workplace Act* (the "Act") currently prohibits smoking in an enclosed workplace, but provides a number of exceptions to this general rule. In brief, employers may allow smoking in designated smoking areas (that comply with standards laid out in the Act), in areas used primarily by the public, in areas used primarily for lodging, or in private dwellings. Employers are prohibited from imposing any sort of reprisal on employees who seek the Act's enforcement or who complain that the Act is not being complied with. The Act authorizes *Occupational Health and Safety Act* ("OHSA") Inspectors to inspect workplaces to determine if the Act is being complied with, and provides fines for violations in the amounts of $500.00 and $25,000.00 for non-employers and employers, respectively.

Bill 164 would repeal the Act and would add to the renamed *Smoke-Free Ontario Act* a prohibition on smoking or holding "lighted" tobacco, in any enclosed public place or enclosed workplace (with the exception of a "residence" or a "private dwelling", both as defined in the amendments). Employers would also be specifically required to do the following:

(a) Ensure compliance with the prohibition;

(b) Give notice to all employees that smoking is prohibited in the area, in a manner that complies with any regulations;

(c) Post any prescribed prohibition signs, in the prescribed manner;

(d) Ensure that persons who refuse to comply with the prohibition do not remain in the area; and

(e) Ensure compliance with any other prescribed obligations.

In addition, Bill 164 prohibits employers from imposing any sort of reprisal on employees who act in accordance with or who seek the enforcement of the *Smoke-Free Ontario Act*. However, Bill 164 does not retain the Act's provision for workplace inspections by OHSA Inspectors. Rather, Ministry of Health inspectors will conduct such inspections and, generally speaking, they will enjoy the same powers OHSA Inspectors currently hold. Fines under the *Smoke-Free Ontario Act* differ from those that currently exist, and increase depending on a history of prior convictions. Generally speaking, the maximum fines for individuals range from $1,000.00 to $5,000.00. For corporations, there is no listed maximum fine for general violations, but $10,000.00 is listed as the maximum fine for violations of the reprisal provisions.

The lawyers at Crawford Chondon & Andree LLP will be monitoring the progression of this Bill and will provide updates in future editions of the *Employers' Edge*.