APRIL 2005

Blaney McMurtry
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Employment Notes

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NEW HOURS OF WORK PROCEDURES INTRODUCED IN ONTARIO

Neal B. Sommer

The government of Ontario has changed the method by which employers may permit employees to work hours in excess of the statutory maximums set out in the *Employment Standards Act 2000* ("ESA 2000"). It has also changed the process under which employers may average an employee's hours of work over a multi-week period for the purposes of calculating overtime pay.

The amendments to the ESA 2000, which were passed on December 9, 2004 became law effective March 1, 2005. Employers who were previously compliant with the obligations established under the ESA 2000, will need to take further steps to remain in compliance with the law. In fact, the system as it is now constituted will require employers to revisit their approvals with the Director of Employment Standards on a regular basis. The Director, in determining whether to grant approval to the applications, will be entitled to review an employer's convictions under the ESA 2000.

Hours of Work

The basic limits on hours of work (maximum 8 in the day, 48 in the week), are retained at section 17 of the amended Act. In order to permit an employee to work in excess of those hours, an employer (as under the ESA 2000), must obtain the employee's agreement in writing. As before, agreements to work excess hours have no expiry, however they are generally revocable by the employee on two weeks notice. With an employee's agreement, the maximum hours that may be worked in a day are 12 (plus two half hour eating periods), and the maximum in a week are 60 (subject to certain exceptions).

Effective from March 1, 2005 before employers may permit their employees to work excess hours the following additional new steps must be taken:

1. The affected employees must be provided a copy of a Ministry of Labour information sheet which sets out their rights vis-à-vis excess hours;

2. The employer must complete an application for approval of the excess hours and submit it to the Director of Employment Standards (new on-line applications are permitted); and

3. The employer must post the Application.

Once the application has been made, following a 30-day waiting period after the application has been made, the employer may to a limited extent permit the employees to work the excess hours. The maximum excess hours that can be worked during this period is 60 in a week (or a lesser amount if the employer applies for a lesser amount). If the application is rejected, the excess hours must stop immediately.

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Mark E. Geiger can be reached at 416.593.3926 or mgeiger@blaney.com.

If the application is approved the employees may continue to work the excess hours for the duration of the approval (maximum three years). When the Director's approval expires, the employer may re-apply for approval. Even though the employee agreements to work excess hours do not expire (though they are revocable), the approval must be renewed every three years.

Averaging Hours of Work for Overtime Calculation

The new amendments require advance approval from the Director of Employment Standards for the averaging of hours of work for the purposes of determining if overtime is payable. The ESA 2000 stipulates that overtime is generally payable after 44 hours worked in the week. Upon written agreement of the employee the employer may average the employee's hours of work over a period of weeks to determine if the average threshold has been exceeded.

The process for obtaining the Director's approval is similar to that which has been established for Excess Hours. Pending approval (or rejection), by the Director of Employment Standards, and following a 30-day waiting period, the employer may commence averaging hours of work over two-week, contiguous non-overlapping periods. ■

RECENT EMPLOYMENT STANDARDS CASE: DEFINITION OF "YEAR"

Mark E. Geiger

A recent decision with respect to the *Employment Standards Act 2000, Casino Rama Services Inc. v. Bourne*, involves the interpretation of the emergency leave provisions of the Act.

History

Section 50 was introduced with other significant amendments, effective September 4, 2001. Section 50 granted emergency leave of up to ten days in a year to employees under circumstances more particularly described in our earlier newsletter. The *Casino Rama* case involved an interpretation as to what was meant by the term "year" in the legislation. As you may recall if you attended our seminar given when this legislation was introduced, the Employment Standards Branch took the position that the term "year" in Section 50 meant a calendar year.

Thus, even if an employee was hired in December, under the interpretation given by the Employment Standards Branch of the Ministry of Labour, the employee would be entitled to ten days of emergency leave in December and then commencing in January, a further ten days for the period from January to December of the next year. The Board found that this interpretation of the term "year" was inconsistent with the interpretation given for the same term in other sections of the ESA. For example, under both the Notice and Severance provisions of the ESA, the term "year" refers to the number of completed years that an employee has worked from the day that they commenced employment, not the number of calendar years in which they may have worked.

In the *Casino Rama* case, an individual had been granted ten days' emergency leave in the 365-day period following the date of their employment. However, that period had overlapped two years. The Ministry therefore took the position that the individual was entitled to ten days during the period of the first year (the stub period), and a further ten days in the calendar year commencing January, after their first year of employment.

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The Decision

In a well-reasoned decision, Kevin Whittaker, Chair of the Ontario Labour Relations Board, together with two other Board members, reviewed in some detail the use of the term "year" in other sections of the ESA, and came to the conclusion that Casino Rama's interpretation was preferable to that of the Employment Standards Branch. Mr. Whittaker found that there were at least twenty different provisions of the ESA where the term "year" was used to measure the passage of time. In every other case where the term "year" was used, it is understood and applied to mean a period of 365 or 366 days, rather than the calendar year. The Director's interpretation was therefore found to be incorrect and the interpretation argued by Casino Rama, was found to be the correct interpretation.

We have been told that the Employment Standards Branch is considering judicial review of this decision. Stay tuned. ■

ONTARIO HEALTH PREMIUM UPDATE

Neal B. Sommer

The Government of Ontario, as a consequence of its 2004 budget, introduced a new scheme for raising funds for the health care system in the Province. The Ontario Health Premium ("OHP"), was established by the statute implementing the budget (Bill 106). Since July 1, 2004 all employees in Ontario have been remitting an additional amount in respect of the OHP. Immediately following the implementation of the OHP trade unions reviewed all of their existing collective agreements to determine whether employers were obliged to bear the cost of the OHP under the language. Their primary focus was on finding language related to the obligation on employers to pay the Ontario Health Insurance Plan ("OHIP") premiums which used to exist until discontinued in 1990.

Many collective agreements did oblige employers to pay OHIP premiums. The question was whether arbitrators would interpret the OHP as meaning the same thing as the OHIP premium. In the eight decisions to date two arbitrators have held the employer liable to pay the OHP, and six have determined that the employer is not liable.

In most of the decisions, a critical issue was whether the OHP was truly a "premium". Only arbitrator Ann Barrett has decided that the OHP is a premium, and accordingly must be paid by the employer. Other arbitrators have declined to follow this ruling and have applied more traditional tests established by the Supreme Court of Canada to characterize the OHP as a form of taxation, notwithstanding the name of the tax. In the other case where the employer was obliged to pay the cost of the OHP the arbitrator decided that the wording of the collective agreement established this obligation whether or not the OHP was a tax. There the collective agreement obliged the employer to pay "the present and future cost of the…medicare plan (O.H.I.P.)…". The arbitrator held that the term "medicare plan" was broader than OHIP premiums, and that all costs borne by an employee for medicare (i.e. publicly funded health care), were transferred to the employer.

The most recent award on the subject, argued by the author, also contained collective agreement language obliging the employer to pay "the full cost of the single and married of O.H.I.P.". In that case the arbitrator determined that the OHP was a tax and not the equivalent of the OHIP premiums. In particular the arbitrator

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noted that the OHP was not dissimilar to the Fair Share Health Care Levy in place in Ontario from 1996 until 1999. Under the collective agreement between the parties the employer was not obliged to pay the taxes of its employees.

The lesson to be learned from this line of cases is that all language in a collective agreement will be given life if possible by an arbitrator. All of the employers who have been subject to arbitration over the OHP thought that the OHIP language in their collective agreement was moribund – they all realized to their dismay that their Union was merely waiting for the possible return of an obligation which could fit the language. Accordingly, employers ought to expend the effort necessary to cleanse their collective agreements of language which no longer has application – it is not possible to conceive of the situations where the language may 'spring to life' after lying dormant for 20 or more years.

As for the cases on the OHP, it appears that the growing trend is for arbitrators to characterize the OHP as a tax. However, as can been seen from the City of Hamilton award, the characterization of the OHP as a tax may not be the end of the issue. Where the language will support liability on the part of the employer, arbitrators, acting on the principle that every clause in a collective agreement must be given life, may feel compelled to rule in the union's favour. ■

Employment Notes is a publication of the Labour and Employment Law Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

WE ARE PLEASED TO ANNOUNCE

Neal B. Sommer, B.B.A., LL.B, has joined the firm's Labour and Employment Group where he will continue to practice all areas of management-side labour law, including negotiation of collective agreements, arbitrations, union-management relations, human rights and wrongful dismissals.

Neal was called to the Bar in 1990 and has co-authored a text on the Labour Relations Act of Ontario. He lectures regularly on human resources issues.

He is a member of the Alliance of Manufacturers & Exporters Canada, the Human Resources Professional Association of Ontario, the Ontario Employers' Labour Relations Council and the Toronto Area Industrial Relations Association.

Neal can be contacted by telephone at 416.596.2879 or by e-mail at nsommer@blaney.com.

Joanna Carroll, B.A., LL.B., a member of Blaney's litigation team focusing principally on commercial issues, has also joined the Labour and Employment Group where she will continue her practice.

Joanna attended the University of Calgary and was called to the Bar in 2001. She is a member of the General Council of the Canadian Bar Association, the Young Lawyers' Division, and the Advocates' Society. Joanna frequently chairs continuing legal education seminars at the Ontario Bar Association.

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HOW TO MAKE A BINDING CONTRACT WITH YOUR EMPLOYEES

D. Barry Prentice

Many employers recognize the utility of having a written agreement with their key employees which spells out the key terms of understanding. The most important of these are usually considered remuneration and severance provisions. An employer who is interested in having certainty may have heard of cases where the Court refused to enforce such terms and therefore asks:

1. Will a signed contract incorporating these terms be enforceable? and

2. If an existing employee signs off on new terms will these terms be enforceable?

A recent case in the Ontario Court of Appeal provides some assistance in answering some of these questions.

On December 15, 1999, a representative of TDI Canada Ltd. met with Allan Hobbs, a sales person, in order to encourage him to leave his existing employment and join TDI. At that meeting, the parties discussed a commission structure which would be suitable to Mr. Hobbs. The following day, TDI made an oral offer of employment to Hobbs that included the commission rates they had discussed on the 15th. Hobbs stated that he would not resign from his current job without something in writing.

On December 22, 1999 Hobbs was given a letter on TDI letterhead offering him a position with the company which confirmed the annual draw against commissions and went on to say that "details on rates, calculation payment of commissions shall be provided to you in a separate document." Hobbs accepted the offer, resigned from his then employment, and began working for TDI on January 4, 2000.

On January 10, 2000 TDI gave Hobbs and the other newly hired TDI sales representatives a document to sign described as being "non-negotiable" which they had to sign it if they were to be paid. This document contained terms relating to the commission structure which had not been discussed previously with Hobbs and which were, as the court ultimately found, quite onerous. After considering the document for a couple of days, Hobbs signed it believing he had no alternative.

A few months later when Hobbs asked for his commissions to be paid according to his understanding, he was reminded of the provision in the document he signed which indicated that no commissions would be paid unless he had surpassed his annual draw (not part of the oral deal in December). Hobbs resigned from TDI and joined a competitor. He sued TDI for constructive dismissal and damages for commissions owing.

At trial, Mr Hobbs was unsuccessful when the trial judge concluded that the document Hobbs signed in January 2000 was merely the second part of one contract of employment. The Court of Appeal rejected this argument because the commission agreement set out in the January document was inconsistent with the commission agreement that Hobbs and TDI had orally agreed upon. The Court of Appeal found that at the time he was presented with the take it or leave it document in January, he had already secured TDI's oral agreement regarding commission rates and had received and accepted a written offer of employment setting out all of the essential terms of the employment contract.

As a result, Mr. Hobbs' claim for commissions calculated on the basis of the original oral agreement was successful. In support of this finding the Court of Appeal quoted from one of its earlier decisions in which it held:

"Employers who wish new employees to sign a standard agreement can incorporate the terms of a standard employment agreement into the original contract of employment by stating in their offer of employment that the offer is conditional upon the prospective employee agreeing to accept the terms of the employer's standard form of agreement, a copy of which could be enclosed with the offering letter."

We can now address the answer to the two questions posed above.

First, a signed employment agreement (provided it complies with all statutory obligations) will be enforceable provided it is executed or specifically referenced at the time of hiring. As far as the second question is concerned, in order to amend the terms of an existing employment agreement (whether oral or written) the employer must provide fresh consideration, namely, some benefit flowing from the employer to the employee at the time the employee requested to sign the new document. This could take the form of a bonus, salary increase, or stock options or some other real benefit.

If you need help in drafting an amending contract for your employee please contact one of our employment group lawyers. ■