



Human Resources Update

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Human Resources Update

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Bill 47 and Bill 66: What You Need to Know

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Bill 47: What You Need to Know

Bill 47: An Overview

- Significant repeal of Bill 148
- All changes now in force
- The Bill amends:



Employment Standards Act, 2000



Labour Relations Act, 1995

Changes to the *Employment Standards Act, 2000*

Bill 47 - Quick Changes

- Minimum Wage
 - Will remain at **\$14.00** for **2019**
 - To be tied to CPI (again) starting in **2020**
- Public Holiday Pay
 - Goes back to pre-Bill 148 (which has been in place since **July 1, 2018** anyway)
 - Total amount of regular wages earned and vacation pay payable in the 4 weeks before the holiday divided by 20

Many Leaves Remain Unchanged

- The following leave related provisions introduced in Bill 148 remain unchanged with Bill 47:
 - ✓ Increased vacation after 5 years of service
 - ✓ Possibility of extended parental leave
 - ✓ Increased pregnancy leave for still-birth or miscarriage
 - ✓ Increased family medical leave
 - ✓ Changes to critical illness leave
 - ✓ Changes to crime-related child disappearance and child death leaves
 - ✓ Domestic or sexual violence leave

Repealed Provisions

- Request for changes to schedule or work location
- Minimum on-call pay
- Minimum cancellation pay
- Right to refuse work without 96 hours notice
- Reverse onus on employers to prove independent contractor not an employee
- Equal pay for equal work

Personal Emergency Leave Overhaul



Previous Scheme

- 10 days (2 paid + 8 unpaid)
- Illness or injury of employee
- Death, illness, injury or urgent matter of certain family members
- Restriction on medical notes



In force January 1, 2019

- Sick leave (3 unpaid days/year)
- Family responsibility leave (3 unpaid days/year)
- Bereavement leave (2 unpaid days/year)

Three Hour Rule Changes

- Applies when: (1) Employee regularly works more than 3 hours per day; (2) is required to present themselves for work, but works less than 3 hours
- Employee is to be paid the greater of:

1

1.3 hours of pay at employee's regular rate; or

2

1. The amount the employee earned while working plus the remaining time calculated at the employee's regular rate

Changes to the *Labour Relations Act, 1995*

Repealed Provisions

- Employee lists with 20% support
 - Disclose name, phone number and personal email
 - Transitional provisions – deemed terminated
- Changes to bargaining unit consolidation
 - amend certificates and consolidated unions

REPEAL

Repealed Provisions

- Card-based certification for certain industries
 - building services,
 - home care, community services or temp help
 - 40% - 55% - vote; greater than 55% certified or vote
- Increased fines
 - restored to \$2,000.00 for individuals and \$25,000.00 for organizations

Altered Provisions

- Remedial certification
- If employer, OLRA and union had 40%
- If the true wishes of the employees could not be reflected in a representation vote



Altered Provisions

Remedial Certification

- **Repealed and replaced** with range of remedial options:
 - order a representation vote to be taken and order steps to be taken to ensure that the vote reflects the true wishes of employees
 - order another representation vote to be taken with necessary steps to ensure it reflects the true wishes of employees
 - if the OLRB determines that no other remedy will be sufficient to counter the effects of the employer's breach of the LRA, certify union

Altered Provisions

- First contract arbitration changed
- Right to return from strike or lockout
 - Employee must return 1 – 6 months

Bill 66: *Restoring Ontario's Competitiveness Act*

Excess Weekly Hours of Work Agreements

- Employers are still required to obtain the written agreement of employees or their bargaining agent to work weekly hours in excess of 48 hours per week
- No need to obtain the approval of the Director of Employment Standards for any such agreement, regardless of the number of hours contemplated in the agreement

Overtime Averaging Agreements

- Employers are permitted to enter into written agreements with employees or their bargaining agent to average hours of work for the purposes of determining entitlement to overtime pay for periods of up to **four weeks** without requiring the approval of the Director
- The averaging periods must be “separate, non-overlapping [and] contiguous”

Overtime Averaging Agreements

- In order to be valid, overtime averaging agreements need to specify a start date and end date
- For unionized employees, the agreement needs to terminate no later than the date that a new collective agreement comes into effect

ESA Poster

- No obligation for employers to post the poster in the workplace
- However, employers still obliged to provide a copy of the poster to their employees

Changes to the Non-Construction Provisions of the LRA

- Municipalities deemed to be “non-construction employers” to whom the construction industry provisions of the LRA do not apply
- Where a trade union represents one of newly deemed non-construction employers, and employees are or may be employed in construction industry, then two changes will occur once the new provisions come into effect:

Changes to the Non-Construction Provisions of the LRA

1. Trade union will cease to represent employees of non-construction employer employed in construction industry; and
2. Any CA binding the non-construction employer and trade union will cease to apply with respect to the non-construction employer to degree that CA applies to the construction industry



Case Law Update

Toronto Community Housing Corp v CUPE, Local 79 (March 2018)

Facts

- Grievor had 2 disciplinary incidents on record:
 - 2-day suspension for excessive absenteeism and failure to provide required medical documentation
 - 3-day suspension for failure to follow proper procedures when dealing with a flood
- 16 allegations of improper conduct of performance deficiencies between May 30/12 and Aug 29/12
- Terminated based on 16 allegations + discipline record

Toronto Community Housing Corp v CUPE, Local 79 (March 2018)

Issue

- Was the termination justified?
- What is the appropriate remedy – reinstatement or damages (and how are damages calculated?)

Decision

- No, Grievor not given opportunity to respond to events that formed basis of discharge.
- Numerous issues with failure to discipline for any of those incidents as they arose
- Lack of discipline suggested management didn't see an issue

Toronto Community Housing Corp v CUPE, Local 79 (March 2018)

Decision

- Even if discharge not justified, reinstatement not always appropriate
- “When a grievance over a discharge is upheld and an arbitrator concludes that the discharge was not justified, one of the customary remedies is reinstatement. There are, however, situations where arbitrators have concluded that reinstatement was not appropriate”
- Factors:
 - refusal by workers to work with grievor
 - lack of trust
 - demeanour / attitude at hearing
 - animosity towards management
 - risk of “poisoned” atmosphere

Toronto Community Housing Corp v CUPE, Local 79 (March 2018)

Decision

- 25 years service at termination, arbitration award 5 years after termination
- The objective of damages - “attempt to compensate a grievor for the consequences of being terminated without cause and does not require significant conjecture and prediction about what might happen to a grievor in the future”
- Awarded 1.25 months per year of service up to date of termination
- Awarded top up of 15% for loss of benefit coverage
- No back pay awarded for 5 year window – there was no reinstatement
- Period of time after termination until award is not added to service
- No payments owed under the *Employment Standards Act*
- Interest was awarded

Key Takeaways



Discipline should be given out ASAP



Use progressive discipline



Reinstatement not always appropriate and the calculation of damages will include a variety of factors but does not include back pay; period of time from termination to award date is not included in calculations

City of Toronto and CUPE, Local 79, 2018 CanLII 76445 (ON LA)

Facts

- Unionized city employee had been suffering from mental health issues resulting from stress
- Employee had received appropriate workplace accommodations since 1999 (fewer hours, fewer work days per week, etc.) and had been considered a “full-time” employee under the Collective Agreement
- Employer changed employee’s status from full-time to part-time
- Union grieves employer’s unilateral change of employee status

City of Toronto and CUPE, Local 79, 2018 CanLII 76445 (ON LA)

Issues

- Is it permissible for the employer to make this change?

Decision

- Arbitrator allows the grievance and restores the employee's full-time status, ordering compensation for losses
- Arbitrator: employer would normally have the ability to make this reclassification; however, due to the length of the accommodation at full-time status, onus shifts to employer to demonstrate reasonable grounds for change or undue hardship to continue to accommodate

Key Takeaways



Duty to accommodate is important, but be mindful of the effects of long-term accommodation



Employer must have reasonable grounds for making changes to a long-term accommodation or demonstrate that continuation of the accommodation would amount to undue hardship

The Corporation of the City of St. Catharines v. The St. Catharines Professional Fire Fighters' Association, 2017 ONSC 7638

Facts

- 2 firefighters (25 and 26 years of service respectively)
- Clean disciplinary records
- Pled guilty to impaired driving (off-duty)
- Licenses suspended
- Required to drive vehicles equipped with an interlock device (could not be installed on fire truck)
- Demoted from first class to second class firefighter
- Arbitrator substituted 2 day suspension for demotions
- Employer sought judicial review

The Corporation of the City of St. Catharines v. The St. Catharines Professional Fire Fighters' Association, 2017 ONSC 7638

Issue

- Was the Arbitrator's decision to substitute a lesser penalty reasonable?

Decision

- The Arbitrator did not believe that the temporary inability to drive rendered the employees incapable of meeting the duties of a first class firefighter
- Arbitrator considered the seriousness of the criminal conduct, the potential for reputational harm, the objective of deterrence, a progressive discipline approach relative to the penalty for lapsed licences, and the Arbitrator's assessment of the seriousness of the loss of the licences
- The Arbitrator indicated that she took all of the circumstances into consideration, which would include the long service and clear prior discipline record of these Employees

Key Takeaways



Consider all the circumstances when deciding on what form of discipline to impose



Does incident render employee incapable of fulfilling their duties?

The Corporation of the City of Kingston and CUPE, Local 1109

Facts

- Grievor unhappy in his department and made a reference to suicide
- Employer sent grievor for an assessment
 - assessment indicated Grievor had an anti-social disorder
 - assessment indicated Grievor was able to return to work
- When Employer directed Grievor to return to work, Grievor produced a note from family doctor identifying certain cognitive limitations
- Employer repeatedly directed Grievor to attend a return to work meeting
- Grievor refused and was terminated

The Corporation of the City of Kingston and CUPE, Local 1109

Issue

- Was the discharge appropriate?

Decision

- The Arbitrator upheld the discharge
- The Arbitrator concluded that the medical reports did not establish a causal connection between the Grievor's mental, emotional and physical state in his refusal to comply with the Employer's directions
- Termination upheld

Key Takeaway



Employer entitled to return to work meeting



**Failure to attend amounts to insubordination
– cause for discipline**



Don't pull the trigger too quickly

Humber River Hospital and Ontario Nurses' Association, 2018

CanLII 115718 (ON LA)

Facts

- Grievor worked for hospital for 3 years until terminated for stealing narcotics and other medications from the hospital
- Evidence established that the grievor was addicted to drugs and often under the influence of drugs at work
- Hospital conducted investigation, met with grievor, terminated employment
- Union argued *prima facie* discrimination on the basis of disability
- Hospital argued just cause because the grievor stole narcotics and other drugs from the hospital, worked under the influence thereby risking patient safety and was repeatedly dishonest about her drug use
- Employer argued it “neither knew nor ought to have known” that the grievor was an addict at the time employment was terminated

Humber River Hospital and Ontario Nurses' Association, 2018

CanLII 115718 (ON LA)

Issue

- Did the employer breach its duty to accommodate under the *Human Rights Code* and collective agreement by terminating a nurse who was stealing as a result of her drug addiction?

Decision

- Detailed analysis of the issue of accommodation and arbitration cases dealing with theft of narcotics by nurses
- Considered three-part test to establish *prima facie* discrimination – grievor suffered from disability, she suffered an adverse impact as a result and found that there was a nexus between the addiction disability and the theft of narcotics which resulted in her termination
- Arbitrator was satisfied the theft was caused by her addiction disability

Humber River Hospital and Ontario Nurses' Association, 2018 CanLII 115718 (ON LA)

Decision

- “Failure to disclose explicitly the disability in advance of termination cannot alone preclude the duty to accommodate, when the inability to disclose may be a feature of the disease itself”
- Held that the hospital had “ample information” prior to the termination to identify the disability issue and it chose to ignore the issue and proceed to termination in light of its views concerning the seriousness of the theft
- Held that the hospital moved swiftly and “made no effort” to inquire into her disability or to determine whether it could have been accommodated” – this constituted a breach of the procedural duty to accommodate under the *Code*
- Reinstatement denied – number of reasons including grievor’s failure to be forthcoming about her addiction and the ongoing lack of trust was warranted

Key Takeaways



The procedural aspect of the duty to accommodate is important, including the obligation to recognize undisclosed disabilities potentially



Addiction cases are difficult as the grievor's ability to explicitly disclose the disability in advance of termination can be directly related to the disability itself



Reinstatement might still be inappropriate (award damages) in such cases where the grievor is not forthcoming and there is a warranted lack of trust established

Questions & Answers



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