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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

If your workplace already provides to your employees more than nine paid days off, you may not be required to provide an additional paid day off for Family Day.

Family Day
Are Your Employees Entitled?

Following the last provincial election, Ontario Premier Dalton McGuinty's first order of business was to fulfill a popular campaign promise – the creation of a new public holiday, "Family Day", to be observed on the third Monday in February. With the addition of Family Day, employees in provincially-regulated Ontario workplaces became entitled to nine statutory holidays per year under the *Employment Standards Act, 2000 ("ESA").*

Must Every Employer Provide 'Family Day' As An Additional Paid Day Off?

The short answer is 'not necessarily'. The comprehensive answer requires an understanding of section 5(2) of the *ESA*, as well as the few Family Day cases which have been decided within the past year.

What Does Section 5(2) of the *ESA* Say?

Under section 5(2) of the *ESA* employers and employees can agree to contract out of the minimum provisions of the *ESA* provided that the agreement (*i.e.*, employment contract or collective agreement) *directly relates to the same subject matter as an employment standard* and provides a *greater benefit* than what is provided under the *ESA.*

Following the introduction of Family Day several unionized employers made the decision to not provide Family Day as an additional paid holiday. They argued that their collective agreements already provided employees with more than nine paid days off. As such, the employees were already entitled to a *greater benefit* than what was provided for under the *ESA*. A number of grievances resulted.

Today, one year since the introduction of Family Day, there is a developing body of case law that has begun to shed light on an employer's obligations. Significantly, all of the decisions have arisen within the context of unionized workplaces (more on the impact of this below).

What is a *Greater Benefit*?

More than 20 years ago, in *Queen's University v. Fraser* (1985), the Ontario Divisional Court confirmed that the assessment of whether an employment contract or collective agreement provides a *greater benefit* than the *ESA* requires a balancing of the respective benefits as a whole – not on a clause by clause basis. In the words of the Court "*one must look at the entirety of the terms in the agreement respecting holidays and not compare each individual term… A proper comparison… involves the placing in one pan of the metaphorical scale the minimum standard set out in [the ESA] and placing in the other pan the totality of rights or benefits… provided for in the [collective agreement].*"

Fast forward to 2008 and arbitrators are still applying the test in *Queen's University*. Moreover they appear to have nearly unanimously

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decided that the analysis is one of simple mathematics - if a collective agreement provides for more than nine paid days off each year, then the collective agreement provides *a greater benefit* than the *ESA*, provided the additional days off have roughly the same characteristics as Family Day. In that case, it is not necessary to provide employees with the additional paid day off for Family Day.

First off, note that the issue is whether or not the employer has provided *more* than nine paid days off *(i.e.*, 10 or more); the *ESA* does not permit an employer to decline to add Family Day to the list of paid holidays if that employer provides only nine paid holidays.

Next, the essential character of the additional day(s) off must be substantially similar to a paid holiday under the *ESA*. By essential character we mean how an employee qualifies to take the day as a paid holiday (must they have worked for a certain period of time or be a full-time rather than a part-time employee), how an employee is paid if they work the holiday (time and a half or straight time), or whether the day off with pay is granted as of right or at the employer's discretion, *etc.*

Does A Float Day Have the Essential Character of a Holiday Under the *ESA*?

Float days are among the most common 'additional' paid days off, particularly within unionized workplaces. The question that is often asked is 'does a float day have the same character as a holiday under the *ESA*?'

Generally speaking, a float day is a paid day off to be scheduled at the request of the employee (although some employers retain the discretion in their collective agreements to approve the requested day). Often, but not always, a float day comes with conditions (*i.e.*, taken within a specific time period; lost if not used; *etc.*).

Unions have argued that the character and quality of a float day (*e.g.*, the conditions that may attach) render it inferior to a statutory holiday. Accordingly, they say, float days should not be included when comparing the relative benefits of a collective agreement and the *ESA*. Since the introduction of Family Day, this argument has not met with great success.

The first post Family Day decision to address float days was *U.S. Steel Canada and United Steelworkers, Local 8782 (Family Day Grievance) (2008)*. In this case the collective agreement provided for nine holidays and one "birthday" float day for a total of ten days off work with pay. Arbitrator Burkett considered the totality of the respective entitlements including the specific characteristics of the float day in the collective agreement. He observed that the float day was listed in the same section of the collective agreement as the other paid holidays, was paid on the same basis as the other paid holidays, and would not be forfeited or lost if not used. On this basis, he concluded that the collective agreement provided for a greater benefit to employees than the *ESA*. As such it was not necessary to provide employees with an additional paid day off for Family Day.

In *Sheppard Village Inc.* and *Service Employees International Union, Local 1.on (Family Day Grievance)* (2008) Arbitrator Burkett adopted an even more flexible view of float days: "*Where float days are included in the holiday provisions of a collective agreement, they are "directly related" to the same subject matter as the public holiday provisions in the ESA. Even where there are factors that distinguish the float days, this does not mean that they are no longer "directly related" to public holidays.*" [emphasis added]

With rare exception, these decisions have been followed by a wide range of arbitrators. Similar analysis has been applied to paid days off for birthdays.

In order to exempt my workplace from the requirement to give Family Day as a paid day off, is it necessary that all of my employees receive a greater benefit? Or is it sufficient that some - perhaps even a majority of - employees receive the greater benefit?

In some workplaces the terms of employment may provide a *greater benefit* to some but not all of the employees. For example, a workplace might provide ten paid days off to its full-time employees but only eight to its part-time employees. In this situation the question is whether the entitlement to an employment standard can be determined by looking at a group of employees rather than individual employees. In other words, could the employer deny Family Day to the part-time employees on the basis that the full-time employees enjoy a *greater benefit*?

Arbitrators within the unionized setting have answered this question 'no'. They say that although the comparison of benefits as between a collective agreement and the *ESA*, is global, the application must be on an individual basis. As such, in the example given above the employer would be required to give to its part-time employees Family Day as an additional paid day off.

Adjudicators that have addressed these issues within a non-unionized workplace have taken an even more restrictive approach to employer rights and have declined to find much, if any, flexibility in the application of the *greater benefit* test. This is because these adjudicators take their authority directly from the *ESA* where individual rights (not the rights of the collective) are paramount. For example, whereas Arbitrator Burkett found that a floater day is not required to have precisely the same character as a paid statutory holiday, *ESA* adjudicators prior to the introduction of Family Day often found that the additional days off must mirror an *ESA* paid holiday.

Lessons Learned

As we approach Family Day for a second time, consider the following:

- Review the terms of your employment contracts and/or collective agreement(s). Do you know if they provide a *great benefit* that what is provided for under the *ESA*?
- If your workplace already provides to your employees more than nine paid days off, you may not be required to provide an additional paid day off for Family Day.
- Are different groups of employees entitled to different numbers of paid days off?
- If some of your employees are already entitled to more than nine paid days off work, but others are not, is your workplace exempt from providing Family Day to those latter employees?

To better understand the application of Family Day to your workplace, please contact Sherrard Kuzz LLP.

Accommodation of Child Care Requests: An Increasingly Blurry Line

The traditional notion of one parent staying at home to care for children while the other parent works out of the home is no longer the reality for most Canadian families. As a result, most employers face the challenge of attempting to accommodate requests from employees for schedule modifications, reduced hours, or flexible work arrangements in order to meet child care obligations. While employers frequently attempt to accommodate these requests, this can be a difficult task. The question then becomes: ***what obligation does an employer have to accommodate an employee's child care requests?***

The Leading Cases: Two Different Views

Human rights legislation across Canada prohibits discrimination on the basis of family status. In the 2004 decision of *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society ("Campbell River")*, the British Columbia Court of Appeal considered whether an employer's refusal to accommodate an employee's child care requests constituted discrimination on the basis of family status.

The employee in this case was a counsellor at a women's shelter who had a child at home with behavioural disabilities. The employee's schedule with the employer enabled her to provide after-school care to her son. When the employer sought to modify the employee's schedule, the employee's union took the position that this change discriminated against the employee on the basis of family status. Specifically, they argued it impaired her ability to provide the care necessary for her son during the after-school hours. The employer continued to insist on the schedule change, despite medical evidence that documented the importance of this care to her son's medical well-being.

> *A line of cases may be developing that places a higher onus on employers to demonstrate that it is impossible to accommodate family-related accommodation without resulting in undue hardship on the employer.*

At arbitration, the union's grievance was dismissed. However, on appeal, the British Court of Appeal concluded that the employer's actions did constitute discrimination on the basis of family status. According to the Court while a conflict between an employee's job requirements and an employee's child care obligations would not normally constitute discrimination, the facts in this situation were such that discrimination did result. The Court concluded that where there is a change in an employee's existing terms and conditions of employment which results in a serious interference with the discharge of a substantial parental obligation, this change can be considered discrimination on the basis of family status.

The *Campbell River* case set a high bar for successful claims of discrimination on the basis of family status in relation to child care obligations. Arbitrators and human rights tribunals have relied on this case routinely as the basis for dismissing claims relating to child care obligations. However, a more recent case from the Federal Court has called into question whether this bar has been set too high for successfully claiming discrimination in family status complaints.

In *Johnstone v. Canada*, the Federal Court heard an application for judicial review of a Canadian Human Rights Commission decision dismissing a complaint alleging discrimination on the basis of family status in relation to child care accommodation. The Canada Border Security Agency required that its employees work on rotating shifts of 37.5 hours per week. Employees could request fixed shifts for the purposes of arranging child care. However, the fixed shift schedule resulted in employees hours being reduced to no more than 34 hours per week.

The complainant, a customs inspector, requested a fixed shift schedule on her return from maternity leave. She also filed a complaint against her employer in light of its policy which would result in a decrease in her hours of work and pay. She alleged that her employer had an obligation to accommodate her child care needs and this included an obligation to accommodate her on a schedule that did not result in lost hours.

In dismissing the complaint the Canadian Human Rights Commission, adopted the test set out in the *Campbell River* decision. It concluded, in part, that the employer's policy did not result in a serious interference with a substantial parental obligation. On review the Federal Court of Canada reversed this decision, criticizing the *Campbell River* decision as being overly restrictive in determining what constitutes discrimination when dealing with issues of family status and child care obligations.

The Federal Court rejected the proposition that in order to find discrimination there needs to be a change in terms and conditions of employment or a "serious interference" in parental obligations. Instead the Court held that the test should be the same it would be in any discrimination case regardless of the protected ground at issue. That is, the Commission ought to have determined whether the policy treated employees discriminatorily on the basis of family status. If it did, the Commission should have considered whether the policy was a *bona fide* occupational requirement such that it would be impossible to accommodate the employee without resulting in undue hardship on the employer.

The Court ultimately set aside the Commission's dismissal of the complaint and ordered that the Commission re-determine the matter. This decision was appealed to the Federal Court of Appeal. In a brief, two paragraph decision, the Court dismissed the appeal, but stated that it would "express no opinion" on the correct legal test for discrimination on the basis of family status. As a result, the Federal Court's decision still stands.

Where Do We Go From Here?

What do these two apparently conflicting decisions mean for employers? To date, most arbitrators and tribunals have followed the reasoning in the *Campbell River* case. That is, that the responsibility to arrange child care that does not conflict with workplace obligations lies with the employee, not the employer. However, employers should be aware that a line of cases may be developing that places a higher onus on employers to demonstrate that it is impossible to accommodate family-related accommodation without resulting in undue hardship on the employer.

We will keep you posted on any new developments in this area as they arise.

DID YOU KNOW?

Effective January 2, 2009, the Public Holidays provisions of the Ontario *ESA* apply to Elect-to-Work Employees (employees under an arrangement whereby they may choose to work when requested to do so and may decline without penalty). The *ESA* provisions that now apply include:

- a day off, with Public Holiday Pay, on Public Holidays; or
- pay at straight time for hours worked on a Public Holiday, plus a substitute day off with Public Holiday Pay; or
- with the written agreement of the employee, pay at 1½ times his or her regular rate for hours worked on a Public Holiday, plus Public Holiday Pay.

For more information please contact Sherrard Kuzz LLP.

HReview Seminar Series

Next in our series of employment and labour law updates:

Managing Employees in Uncertain Economic Times

1. Layoffs and Terminations

Employment Standards Act Issues
- Notice of layoff or termination
- Continuation of benefits
- Mass termination

Common Law Issues
- Constructive termination
- Reasonable notice
- Class-action lawsuits

2. Managing the Fallout
- Job sharing options
- Strategies to build loyalty and long-term productivity with employees who remain after a downsizing

DATE: **Thursday March 26, 2009, 7:30 – 9:30 a.m.** (program at 8:00 am; breakfast provided)

VENUE: **Eagles Nest Golf & Country Club,** 10000 Dufferin Street, Maple 905.417.2300

COST: Please be our guest

RSVP: By Friday, March 13, 2009 to info@sherrardkuzz.com or 416.603.0700

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