MANAGEMENT
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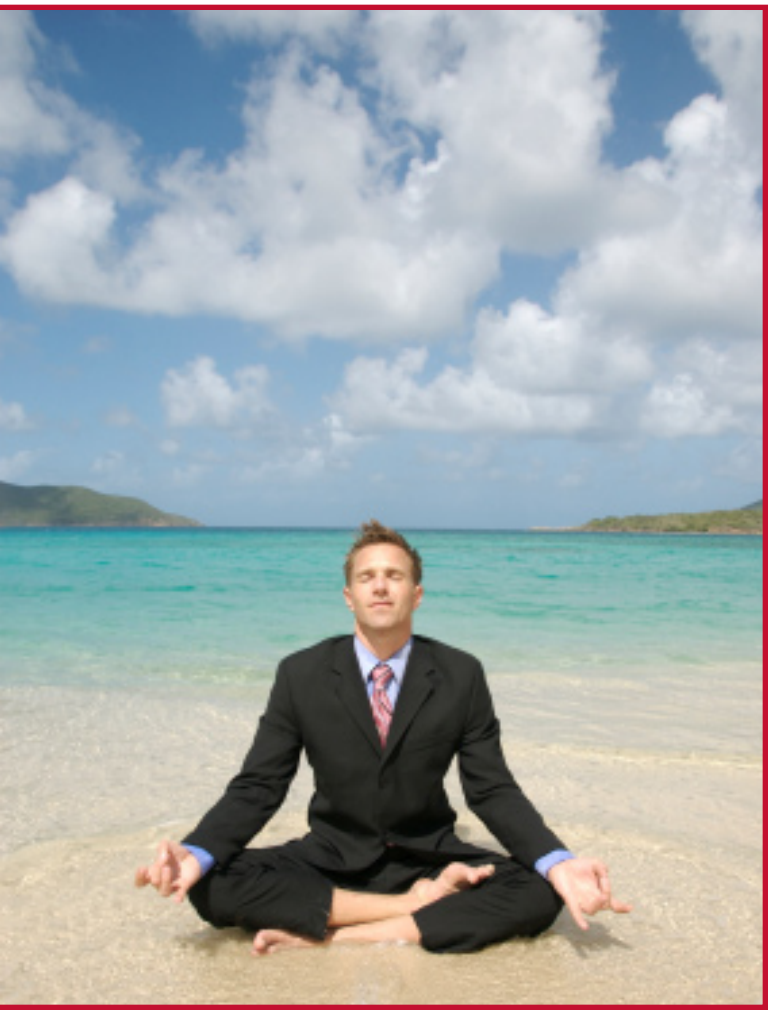
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers



Spring Cleaning:

Five Steps To Get Your Vacation Policy Into Shape

1. Understand the distinction between Vacation Time and Vacation Pay

Vacation Time is a period of time off from work. Vacation Pay is the wages that are payable to an employee during a vacation. Pursuant to the Ontario *Employment Standards Act, 2000* (the "*ESA*"), an employee who has completed one vacation entitlement year is entitled to (i) two weeks of Vacation Time and (ii) Vacation Pay in the amount of 4% of the wages earned during the vacation entitlement year, excluding Vacation Pay.

An employee becomes entitled to Vacation Time only after he or she completes a vacation entitlement year. By contrast, an employee accrues Vacation Pay starting from his or her first day of employment.

Example #1

Francis began employment at YYZ Inc. on February 1, 2008. As of February 1, 2009, Francis is entitled to two weeks' Vacation Time and Vacation Pay in the amount of 4% of the wages he earned between February 1, 2008 and January 31, 2009.

Example #2

Peter began employment at YVR Ltd. on April 1, 2008 and resigned on October 31, 2008. Because he was not employed for one full year, Peter was not entitled to any Vacation Time under the *ESA*. However, YVR Ltd. must pay Peter Vacation Pay equivalent to 4% of the wages he earned between April 1, 2008 and October 31, 2008.

2. Ensure that your company is calculating Vacation Pay correctly

Because many employers think of vacation as "paid time off work", it is commonplace for an employer to simply continue paying an employee's regular salary when he or she is on vacation. While in many cases such a practice would be in compliance with, or even exceed, the minimum entitlement under the *ESA*, under certain circumstances it could lead to an employer *underpaying* Vacation

continued inside...

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Pay. Under the *ESA*, "wages" include not only regular salary but also other monies paid to an employee such as:

- overtime pay
- public holiday pay
- allowances for room or board
- non-discretionary bonuses, the payment of which is related to an employee's hours of work, productivity or efficiency
- profit-sharing bonuses
- commissions

Example #3

Jack began employment at LHR Inc. on January 1, 2008 and works a regular 44-hour week at an hourly wage rate of $15.00. During the first year of employment, Jack worked and was paid 100 hours in overtime. Jack also received a $500 incentive bonus for meeting a production target in the second half of 2008. Jack did not take any time off during his first year of employment.

As of January 1, 2009, Jack is entitled to two weeks' Vacation Time. The amount of Vacation Pay, however, is *not* simply two weeks' regular salary. It is calculated by:

Regular salary:	
$15.00 x 44 hours/week x 52 weeks	$ 34,320.00
Overtime pay:	
$15.00 x 1 ½ x 100 hours	$ 2,250.00
Incentive bonus:	$ 500.00
Wages (Jan. 1 to Dec. 31, 2008):	$ 37,070.00
Vacation Pay equivalent to 4% of Wages:	$ 1,482.80

Therefore, if LHR Inc. simply paid Jack two weeks' regular salary ($15.00 x 44 hours/week x 2 weeks = $1,320.00) as Vacation Pay, it would be underpaying Vacation Pay by $162.80.

3. Check that all employees, not just full-time employees, are given Vacation Time

"Our part-time employees don't get time off. We just pay out their Vacation Pay."

Regardless of whether an employee is employed on a full-time, part-time, casual, seasonal or fixed-term basis, an employer is required to give him or her two weeks of Vacation Time if the employee completes a vacation entitlement year.

The only exception is where an employee belongs to a category of employees that is specifically exempted by the *ESA* and its Regulations (e.g., Crown employees, certain professionals and secondary school students performing work under a work experience program authorized by the school board, etc.).

4. Obtain approvals for agreement to forego Vacation Time

"The employee said that he didn't want to take vacation and just wanted to be paid Vacation Pay because he needed extra money."

Under the *ESA*, an employee cannot simply agree to forego his or her Vacation Time. Such an agreement between an employer and an employee is valid *only* if it is approved by the Director of Employment Standards.

An employer must pay an employee his or her Vacation Pay even if the employee has chosen to forego Vacation Time pursuant to a valid agreement.

5. Keep accurate records of Vacation Time and Vacation Pay

The *ESA* requires an employer to keep the following records for each vacation entitlement year for at least three years:

- the amount of Vacation Time earned and taken
- the balance of Vacation Time not taken
- the amount of Vacation Pay paid
- the wages on which Vacation Pay was calculated and the period of time to which the wages relate

Furthermore, an employer should keep accurate records of Vacation Time and Vacation Pay for other, practical reasons.

Scenario A

HKG Inc. pays its employees Vacation Pay on each paycheque. It does not provide on the pay statement details regarding the amounts that are paid for regular salary and vacation pay respectively. An employee files a complaint with the Ministry of Labour alleging that he was never paid Vacation Pay.

Scenario B

LGA Ltd. continues paying an employee's regular salary during his or her vacation. It does not keep records regarding when vacation was taken and how vacation pay was calculated. An employee files a complaint with the Ministry of Labour alleging that he has not been given either his Vacation Time or Vacation Pay. He claims that he was in fact working during the "vacation period".

In both cases, if the employer is unable to produce records that satisfy the Ministry of Labour that Vacation Time and/or Vacation Pay were in fact given to the employee, the Ministry of Labour may choose to accept the employee's allegations and make an order against the employer.

Therefore, keeping accurate records not only ensures statutory compliance but also protects the employer's interests in the event that a dispute arises.

To learn more, please contact a member of our team.

"How Much Do You Make?"

Determining Income in the Ontario Workers' Compensation Regime

Ontario employers paying Workplace Safety and Insurance Board (WSIB) premiums will be interested in a recent Ontario Court of Appeal decision (*Rodrigues v Ontario (Workplace Safety and Insurance Appeals Tribunal*) ("WSIAT"). In this case an individual challenged the WSIB's longstanding policy of excluding an employer's contribution to a health and benefit plan from the calculation of "pre-accident earnings". The outcome may affect the amount of WSIB premiums paid by employers.

Background

The *Workplace Safety and Insurance Act ("WSIA")* provides benefits to a worker injured in the course of employment. The benefits compensate the worker for wage loss arising as a result of injury. The amount of the benefit is calculated as a percentage of a worker's pre-accident earnings (also referred to as the worker's "earnings basis").

Historically, and in accordance with WSIB policy, the calculation of pre-accident earnings has not included contributions made by an employer on account of a health and benefit plan. Mr. Rodrigues challenged this. He claimed that his pre-accident earnings *should* include his base wage rate *plus* the amount that his employer contributed on account of his health and benefit plan.[1] He argued that it was the government's intention that employer contributions be included in the calculation, and referenced certain government statements to this effect. If correct, the compensation paid to Mr. Rodrigues by the WSIB would increase by almost $5.50 an hour (or almost 15%).

The Decisions

The Tribunal rejected Mr. Rodrigues' argument, preferring instead the WSIB policy and practice. However, the Ontario Divisional Court, in a 2-1 decision, sided with Mr. Rodrigues. The Court held that the Tribunal's failure to consider the legislative history was a "reviewable error", and ordered the case back to the Tribunal for reconsideration.

The Divisional Court's decision was appealed to the Ontario Court of Appeal, which, in another 2-1 split, restored the decision of the Tribunal. In summary, the Court of Appeal held that the Tribunal's decision was neither unreasonable nor had the Tribunal committed a reviewable error in failing to consider legislative history.

Looking Forward

In one respect, the Court of Appeal's decision is not surprising. In the history of the WSIAT and its predecessor tribunal (the WCAT), the Divisional Court has rarely interfered with WSIAT decisions. Moreover, each time the Divisional Court has set aside a decision of the WSIAT, the Court of Appeal has restored the Tribunal's decision. This unblemished record of the WSIAT is astonishing considering the thousands of cases it has decided.

If successful, this may have a profound effect on the cost of WSIB premiums, as well as trigger a considerable transfer of wealth from employers to workers - the beneficiaries of the workers' compensation system.

At the same time, there may be reason for caution. Neither the Divisional Court nor the Court of Appeal was able to reach consensus on the issue. At both court levels there was a strong dissenting opinion. As such, it is possible – although not likely – that the Supreme Court of Canada will hear the case in an effort to set the record straight. Indeed as at the time of writing this article, Mr. Rodrigues had filed a motion for leave to appeal to the Supreme Court.

In our experience, however, the Supreme Court has a record of directing lower courts to show deference to administrative tribunals. As such, we do not expect the Supreme Court to hear this case. However, even if it doesn't, injured workers' advocates may try another tactic – convincing lawmakers to amend the legislation so that it clearly includes employer benefit contributions in the calculation of "pre-accident earnings".

If successful, this may have a profound effect on the cost of WSIB premiums, as well as trigger a considerable transfer of wealth from employers to workers - the beneficiaries of the workers' compensation system.

The team at Sherrard Kuzz LLP will continue to follow this case and related amendments to the WSIA. Meanwhile, should you have questions or concerns about your company's workplace safety and insurance obligations, please contact a member of our team.

DID YOU KNOW?

The Province of Ontario has unveiled new civil court rules which increase - from $10,000 to $25,000 - the monetary limit in Small Claims Court actions. The changes will take effect January 1, 2010.

For more information please contact Sherrard Kuzz LLP.

[1]Section 25 of the *WSIA* provides that employers, in most circumstances, must continue benefit contributions during the first year of injury. As such, the decision in *Rodrigues* only applies to the calculation of pre-accident earnings for workers who remain injured after the first 12 months of injury.

MANAGEMENT COUNSEL

DID YOU ALSO KNOW?

Sherrard Kuzz LLP is on the move...

Effective Monday April 20, 2009, Sherrard Kuzz LLP has a **new home!**

250 Yonge Street, Suite 3300, Toronto, Ontario, Canada, M5B 2L7

All other contact information (i.e., telephone, fax, email) remain unchanged.
Please update your records.

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

Performance Management - How To Manage, Motivate and Avoid Liability

1. **Defining "Performance Management"**
2. **When and How to Use Performance Management**
3. **Designing An Effective Performance Management Plan**
4. **Reasonableness of Goals**
   - Legal Issues
   - Human Rights Issues
   - Practical Considerations
   - The Uncooperative Employee
   - 7 Mistakes To Avoid
5. **Post Plan Follow Up**
   - Communication
   - Assessment
   - Documentation
6. **The Termination Decision**
   - File and Performance Review
   - Employer Response to Non Compliance
   - Termination - Cause or Without Cause?

DATE: **Wednesday June 3, 2009, 7:30 – 9:30 a.m.** (Program at 8:00 a.m. - breakfast provided.)

VENUE: **Hilton Garden Inn Toronto-Vaughan,** 3201 Highway 7 West, Vaughan, Ontario 905.660.4700

COST: Please be our guest

RSVP: By Friday, May 27, 2009 to info@sherrardkuzz.com or 416.603.0700

HRPAO CHRP designated members should inquire at www.hrpao.org for certification eligibility guidelines regarding this *HReview Seminar*.

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