MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Religious Holidays and Accommodation

As employers begin to think about holiday season scheduling, remember there are many religious holidays that occur throughout the year for which employees may require time off to observe or celebrate. *Eid-al Adha, Diwali, Ashura, Hanukkah, Kwanzaa,* the Lunar New Year, and varying dates for Christmas are only a few of the religious days employees may observe.

In Ontario, the obligation to accommodate observance of religious holidays is rooted in the *Human Rights Code* (the "*Code*"). The *Code* protects an employee from discrimination on the basis of creed (religion). But what exactly does this mean as it relates to workplace scheduling? How far must an employer go to meet its legal obligation? With foresight, collaboration and planning, there are many scheduling options that can work for both the employer and employee.

What's Discriminatory and What's Not?

The *Code*'s creed-based protection has been interpreted to mean an employer must accommodate an employee's need for time off to observe religious holidays. In the past, employees have argued it was discriminatory to provide paid holidays for Christmas and Good Friday, but not for other religious holidays. However, today, courts and arbitrators consider Christmas and Good Friday to be *secular pause days*; and, as a result, it not discriminatory that these days are paid holidays.

However, discrimination *will* exist where some employees are able to observe religious holidays without loss of pay, but other employees are not. The goal is to allow every employee the opportunity to observe his or her religious holidays without penalty. This does not necessarily mean giving additional paid days off to those employees who request time off for religious observance. If that were the case, those employees would receive an even greater benefit than other employees. Generally, the way to achieve accommodation is to alter work schedules so employees receive the time off they require without loss of pay or pre-existing entitlement (such as vacation time).

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Methods of Accommodation

A common method of accommodating religious observance is to provide an employee with a "menu of options" for making changes to his/her work schedule. These options, which have consistently been held to be an appropriate method of accommodation, may include:

- Adjusting hours in the employee's schedule
- Adding hours to shifts to build up time off

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- Allowing an employee to take an unscheduled shift to make up time off
- Shift swapping
- Allowing an employee to work on a paid public holiday when the workplace is in operation, subject to the provisions of the *Employment Standards Act*

In addition, where an employment agreement or collective agreement provides an employee with special or discretionary days off, an employee may be entitled to use these days for religious purposes regardless how the employer would like them to be used. In a 2011 decision, *Koroll v. Automodular Corporation*, the Ontario Human Rights Tribunal (the "Tribunal") held where a mechanism exists by which an employee's religious observance might be accommodated, an employer is obliged to make that mechanism available to the employee.

Time Off and Benefits

Time taken off for religious observance cannot be counted against an employee for the purpose of calculating benefits. In *Koroll v. Automodular Corporation* the employer properly accommodated the employee's religious holiday by allowing the employee to work additional unscheduled hours throughout the year. However, the employer counted days off for religious observance against the employee in denying him a bonus for perfect attendance. The Tribunal held an employee's job benefits are protected in the same way as wages: they should be preserved by any means available to the point of undue hardship to the employer. The employer was ordered to pay the employee the bonus for perfect attendance.

Dialogue is the Key

The Tribunal has consistently emphasized accommodation is a process that requires dialogue between the employer and employee. There is nothing inappropriate about discussing options for accommodating an employee after he or she has requested time off to observe a religious holiday. An employer that maintains a dialogue with employees, supported by well drafted and consistently implemented attendance and accommodation policies, will be well prepared to handle religious observance requests all year round.

To learn more or for assistance addressing religious accommodation in your workplace please contact a member of our team. ***Please also join us at our upcoming HReview Breakfast Seminar*** *at which we will address* **What Employers Must Know for the Holiday Season** *(invitation on the back page of this newsletter).*

Attention All Construction Employers: Does Mandatory WSIB Coverage Apply to You?

As of January 1, 2013, Bill 119, the *Workplace Safety and Insurance Amendment Act, 2008* (the "*Act*") makes insurance coverage mandatory for certain 'persons' operating in the construction industry (*i.e.,* independent operators, sole proprietors, partners in partnerships, and executive officers of a corporation). Currently, and until January 1, 2013, coverage for these persons has been optional.

Failure to comply with Bill 119 may result in a charge under the *Provincial Offences Act*, and a fine not exceeding $25,000, or imprisonment not exceeding six (6) months, or both. A corporation is liable to a fine not exceeding $100,000.

Additional Requirements

Bill 119 also imposes the following additional requirements:

- A 'person' is prohibited from performing construction work without a valid clearance certificate.
- An employer that directly retains a 'person' named above is required to ensure the 'person' complies with all payment obligations under the *Act*. Failure to do so may expose the employer to liability for the 'person's' non-payment or non-compliance.
- An employer that directly retains a 'person' to perform construction work is required to obtain a clearance certificate from the Workplace Safety & Insurance Board ("WSIB") prior to the commencement or continuation of work.
- An employer must retain the clearance certificate for at least three years, and it must be produced for inspection at the request of the WSIB.

These requirements do not apply to home renovation work (as defined in the *Act*).

Best Practices for Employers

Any 'person' that retains a construction worker, or that 'person' him/herself, should register with the WSIB and obtain WSIB coverage or plan to extend any current WSIB coverage as soon as possible to ensure compliance with Bill 119. Remittances are not owed until January 1, 2013.

In addition, employers should consider the following best practices:

- Consider a contractual provision that makes a valid clearance certificate a condition of being retained, and hold back payment to cover any unexpected WSIB liability.
- Obtain proof of a valid clearance certificate at the bidding stage, or at the very least, prior to the commencement of work.
- Verify the clearance certificate does not expire during the duration of the contract for which the person is being retained. If it does, require a new certificate before work continues.
- In the case of exempt home renovation work, be diligent about contacting the WSIB should the scope of work expand beyond the stated exception.
- Appreciate that private insurance is not a substitute for the required WSIB coverage.

For more information please contact a member of Sherrard Kuzz LLP.

Freedom of Association Enjoyed by Individuals, Not Unions
- so says Ontario's Highest Court

A recent decision of the Ontario Court of Appeal provides reassuring news for employers about the scope of the right to freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). In *Independent Electricity System Operator v. Canadian Union of Skilled Workers* ("*I.E.S.O.*"), Ontario's Highest Court confirmed the *Charter* does not extend to guarantee employees work, nor does it operate to assure trade unions of their preferred collective bargaining regime.

In *I.E.S.O.* the central issue before the Court of Appeal was the constitutional validity of section 127.2 of the Ontario *Labour Relations Act* (the "*Act*"). Section 127.2 permits an employer that does not actively carry on business in the construction industry for profit, but that avails itself of construction industry services, to bring an application to the Ontario Labour Relations Board (the "Board") for a declaration it is a "non-construction employer".

The significance of a non-construction employer declaration is two-fold. First, any trade union that represents (or may represent) construction employees of the employer no longer represents them. Second, any collective agreement ceases to apply to the employer insofar as it relates to the construction industry.

The crux of the argument advanced by the trade unions in *I.E.S.O.* was that the non-construction employer provisions of the *Act* constituted a substantial infringement of their members' right to freedom of association under section 2(d) of the *Charter*. In particular, the trade unions asserted the impugned section of the *Act* deprived their members of guarantees of future work to which they would have otherwise had access.

The Court's commentary regarding the scope of Charter rights in labour relations generally has implications for all employers.

The matter was initially heard by the Board which ruled the *Act*, in operating to terminate existing bargaining rights and nullify negotiated agreements, amounted to an unjustifiable infringement of the collective bargaining process. However, the Board's decision was later overturned by the Ontario Divisional Court and subsequently appealed to the Ontario Court of Appeal.

In a unanimous decision, the Ontario Court of Appeal affirmed the constitutional validity of the non-construction employer provisions, finding the Legislature was entitled to exempt non-construction employers from the industry-specific provisions of the *Act*. In coming to this conclusion, the Court specifically noted section 127.2 did not prevent employees from availing themselves of the general provisions and protections of the *Act*, but simply limited their access to the statutory scheme specific to the construction industry.

The Court affirmed that while section 2(d) of the Charter protects the right of employees to associate collectively to effect change in the workplace, this protection does not extend to: (1) ensure a particular or desired outcome in a labour dispute; (2) guarantee access to any particular statutory scheme or preferred bargaining regime; or (3) provide job security or protect future employment opportunities.

The Court of Appeal's decision represents an important development for employers to which the non-construction employer provisions apply. More importantly, however, the Court's commentary regarding the scope of *Charter* rights in labour relations generally has implications for all employers. In particular, the Court affirmed that while section 2(d) of the *Charter* protects the right of employees to associate collectively to effect change in the workplace, this protection does not extend to: (1) ensure a particular or desired outcome in a labour dispute; (2) guarantee access to any particular statutory scheme or preferred bargaining regime; or (3) provide job security or protect future employment opportunities. In reaching these conclusions, the Court also confirmed "that freedom of association, as guaranteed by s. 2(d), is enjoyed by individuals, not by unions."

As of the writing of this article (September 2012) the union had sought leave to appeal the decision to the Supreme Court of Canada. As such, the exact breadth of the right to freedom of association is far from settled. For now the *I.E.S.O.* decision provides helpful and reassuring guidance to employers on this evolving issue.

Sherrard Kuzz LLP will keep readers apprised of developments in this important case.

DID YOU KNOW?

The Ontario legislature recently passed amendments to the Ontario *Human Rights Code* which prohibit discrimination and harassment on the grounds of "gender identity" and "gender expression", signifying an increased awareness of issues facing Ontario's trans-gendered community. Employers and service providers alike are advised to review their current policies and procedures to ensure continued compliance with *Code* requirements.

HReview
Seminar Series

Please join us at our next HReview Breakfast Seminar:

'Tis the Season...

What Employers Must Know for the Holiday Season (It's not just about the parties!)

The holiday season is upon us. For many, it's a time of celebration, gifts and religious observances. As always, Sherrard Kuzz LLP wants employers to be prepared to deal with the full range of holiday season issues as they relate to the workplace.

At this HReview breakfast seminar we will address:

1. Religious accommodation – what, when, who, and how?
2. An employer's duties (and potential liability) when holding a holiday party – alcohol, transportation, harassment, supervision, *etc*.
3. Holiday gifts, bonuses, public holiday pay and/or time off in *lieu* – when, how and tax implications.
4. Legal proceedings you can't ignore – don't turn off your fax machine!

DATE: **Tuesday November 20, 2012; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Hilton Garden Inn, Toronto-Vaughan,** 3201 Hwy 7 West, Vaughan, ON L4K 5Z7

COST: Please be our guest

RSVP: **By Tuesday November 13, 2012 at www.sherrardkuzz.com/seminars** or to 416.603.0700
(for emergencies our 24 Hour Line is 416.420.0738)

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

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

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