FTR Now

Update on Family Day

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Immediately following last year's provincial election, the Ontario Government created a new public holiday under the *Employment Standards Act*, 2000 (the "ESA") – Family Day, which falls on the third Monday of each February. Shortly after the introduction of the new holiday, employers turned their mind to the question of whether they would be required to provide the new holiday to their employees in addition to their existing entitlements.

In the case of Re *U.S. Steel and U.S.W., Local Union 8782* (19 March 2008, Burkett), Arbitrator Burkett confirmed that where a collective agreement [or other employment contract] provides a greater benefit to employees than would the *ESA*, it is not necessary to provide employees with the new holiday. U.S. Steel was successfully represented by Stephen J. Shamie, Hicks Morley's Partner.

U.S. Steel's collective agreement provided for nine holidays plus one "Float Day", for a total of ten holidays with pay. The Float Day was to be taken within two weeks of the employee's birthday.

The union raised some creative arguments in support of its case. It argued that under the new *ESA*, the parties had to explicitly contract out of the statute before they could rely on the greater benefit provisions. Moreover, the union argued that the traditional balancing or package approach established in the 1985 *Queen's University v. Fraser* case should not apply; rather, the focus should be very narrow, and look only to the existence of a February or mid-winter holiday. Finally, relying on Arbitrator Tacon's 2001 *Toronto Zoo* case, the union argued that the Float Day should not be counted.

The employer successfully refuted each of these arguments. Arbitrator Burkett found that the traditional Queen's University balancing approach continues to apply under the new *ESA.* Similarly, he rejected the notion that the parties must expressly contract out of the *ESA* as a precondition to asserting a greater benefit, noting that such a finding would render almost all greater contractual entitlements void and would replace them with the lesser entitlements of the *ESA*. Finally, Arbitrator Burkett distinguished the Float Day from the days considered by Arbitrator Tacon in *Toronto Zoo*. (In a subsequent award in which he confirmed his *U.S. Steel* analysis, Arbitrator Burkett expressly disagreed with Arbitrator Tacon's analysis, and found that floater days should be included in the greater benefit analysis, subject to being accorded less weight in the analysis if they have greater restrictions than those imposed by the statute).

In the result, since U.S. Steel already provided ten holidays, it provided a greater benefit than the *ESA's* requirement of nine holidays, and it did not need to provide Family Day as well.

With a similar result being reached by Arbitrator Rayner, and absent collective agreement language that might capture the new holiday, the cases are making it quickly apparent that where employers provide a greater benefit than the *ESA* – generally ten or more holidays – they need not provide the new Family Day.

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