Case In Point

Accrual of Service or Seniority Based on “Days Worked” is Not Discriminatory, Tribunal Rules

Date: May 24, 2016

The Human Rights Tribunal of Ontario (HRTO) recently issued a decision of particular interest to employers with groups of employees who, although covered by a collective agreement, accrue service or seniority based on days of active work.

The Limestone District School Board employed casual employees who were covered by a CUPE collective agreement. Casual employees had sporadic hours of work and were used to fill in for absent regular employees. The collective agreement stated that casual employees were not entitled to accrue seniority. Instead, they accrued service based on the “days worked” as a casual employee.

The Applicant was a casual Educational Assistant and then became a casual Caretaker. During her tenure as a casual employee, she took two pregnancy/parental leaves and had a series of unrelated sick leaves, during which times she did not accrue service, since these were not “days worked.” The Applicant became a regular part-time Caretaker and was then entitled to accrue seniority and to be credited with her “days worked” as a casual employee towards her newly acquired seniority.

The Applicant claimed that it was discriminatory and contrary to the *Human Rights Code* (*Code*) for the Board and the collective agreement to have denied her any ability to accrue service while on statutory or sick leaves.

The Board argued that the accrual of “days worked” as a casual employee was negotiated with and agreed upon by CUPE as an appropriate method of service accrual for a casual employee. Given the sporadic and unpredictable nature of casual work, this was a reasonable method of service accrual. The Board also argued that accruing service based on “days worked” as a casual employee was not discriminatory, in that the days a casual employee did not work could be due to a variety of reasons, and not specific to any of the prohibited grounds of discrimination.

Significantly, the HRTO adopted the Board’s argument that failure to accrue service for days not worked, regardless of the reason for not working, was not discrimination contrary to the *Code*.

This case was argued by Vince Panetta of our Kingston office. For more information on this case or related matters, please contact Vince or your regular Hicks Morley lawyer.

Bender v. Limestone District School Board, 2016 HRTO 557 (CanLII)