Minimum Standards Monitor

Recent ESA Cases of Note

Date: October 9, 2018

In the month of September 2018, a number of notable decisions were rendered by the courts and arbitrators on issues under the *Employment Standards Act, 2000.* Topics included the appropriate time to file and post a Form 1 in cases of mass termination and the new personal emergency leave requirement that the first two days of the leave be paid. Learn more in this *Minimum Standards Monitor*.

Planning to Give Notice of Mass Termination under the ESA? What Employers Should Know – Part II

In a significant decision rendered on September 19, 2018, *Wood v. CTS of Canada Co.*, the Ontario Court of Appeal considered the Form 1, which is required under the *Employment Standards Act, 2000* (ESA) to be posted and filed in cases of mass termination. It confirmed that the Form 1 does not need to be posted and filed until that part of the notice period *which is the statutory notice period* begins to run. In so finding, the Court reversed a decision of the Superior Court which had concluded that the Form 1 should have been posted and filed at the time working notice was given, not the last 8 weeks of the notice period. As a result, the employer had been precluded from relying on the working notice period for the purposes of providing common law reasonable notice. We discussed the Superior Court decision in an earlier publication.

Limitation Periods and the Statutory Notice Period

On September 20, 2018, the Supreme Court of Canada dismissed leave to appeal from a decision of the Court of Appeal in *Bailey v. Milo-Food & Agricultural Infrastructure & Services Inc.*, which examined the statutory notice period where more than the minimum notice is provided. Specifically, the Court considered when the limitation period for a wrongful dismissal claim begins to run – is it when notice of termination is provided, or is it when the statutory notice period starts?

The appellant had been provided with two years' working notice. Six months after the notice period expired and he worked his last day, he brought a claim for, among other things, wrongful dismissal and severance pay pursuant to the ESA.

The respondent brought a motion to strike the appellant's claims on the basis that they were brought beyond the two-year limitation period. The motion judge granted the respondent's motion to strike in respect of the appellant's claim for severance pay and wrongful dismissal. The appellant appealed this decision.

The Court of Appeal accepted the appellant's argument that a claim for severance pay does not crystalize until an employee's effective date of termination (the end of the notice period). As such, the decision of the motion judge striking this aspect of the claim was overturned. However, the Court upheld the motion judge's finding that the appellant's wrongful dismissal claim crystalized when the working notice was provided and thus the claim was brought outside of the limitation period.

The Latest on PEL

Three recent arbitration cases have considered the new requirement under the personal emergency leave (PEL) provisions of ESA that the first two days of the leave be paid. The cases are summarized below.

Case 1: Reasonable Evidence of Entitlement and Whether PEL Can Be Offset from Lieu Days.

Arbitrator Stout considered the circumstances under which an employer could deny an employee access to a paid PEL day in The Corporation of the Town of Oakville and Oakville Professional Fire Fighters Association, Local 1582, rendered on September 9, 2018.

In this case, the grievor wrote to his employer on May 12, 2018 and indicated he would be taking a "personal liberal day on Sunday, May 13, 2018," which happened to be Mother's Day. When the employer questioned the grievor on the reason for the absence, the grievor indicated that according to "Liberal legislation" he was not required to provide a response and that he was attending to a "personal matter." Ultimately, the absence was taken without pay, and a grievance was filed.

On the question of whether the day qualified as a PEL day, Arbitrator Stout concluded that the grievor failed to comply with the requirement to advise his employer of the nature of his request and provide reasonable evidence of the same.

Arbitrator Stout then went on to consider whether there were any entitlements under the collective agreement that could offset the PEL entitlement. He found that the grievor's earlier use of paid sickness and bereavement benefits would have offset any entitlement the grievor would have had to a paid PEL day. In addition, the Arbitrator determined that the employer was not entitled to offset an employee's PEL entitlements with the employee's use of a lieu day as the purpose underlying the lieu day (holiday/vacation) differed from the purposes underlying PEL (emergency circumstances). We note that a similar conclusion was reached by Arbitrator Rogers in the *Carillion* case summarized in our last publication.

Case 2: Does PEL Qualify for Premium Pay if the Day Missed Attracted a Premium?

In *Belden Canada Inc. and United Steelworkers*, rendered on September 14, 2018, Arbitrator Brownlee canvassed the issue of whether an employee was entitled to premium pay where the employee accessed PEL.

In this case, the grievor took a paid PEL day on a Sunday shift that attracted premium pay of time and a half for the first 8 hours and double time for the next 4 hours. It was not in dispute that if the grievor had worked his shift, he would have received 20 hours pay for 12 hours work. The issue before the Arbitrator was whether the grievor should receive 12 hours of pay at his regular rate of pay, or whether he should receive 20 hours of pay.

Arbitrator Brownlee noted the provisions in the ESA stipulating that employees are only entitled to their regular rate of pay on a PEL day and dismissed the arguments of the union to the contrary. As such, the Arbitrator determined that the grievor was only entitled to receive 12 hours of pay at his regular rate.

Case 3: Considering Paid and Unpaid Entitlements in the Greater Right or Benefit Analysis.

In *United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, Local 9235 v St. Marys Cement*, rendered on September 14, 2018, the employer argued that the following paid entitlements under the collective agreement provided a greater right or benefit than the paid PEL entitlement: shift premiums, break premiums, vacation pay, bereavement leave, weekly indemnity and long-term disability, paid holidays, jury duty pay and a $1,000 annual security payment that may be accessed upon retirement, leaving employment or lay-off. The employer also noted that the weekly indemnity and long-term disability provides up to three years of income protection for employees who suffer illness or injury.

Prior to the coming into force of the new PEL provision on January 1, 2018, the employees were entitled to take all ten unpaid PEL days. The employer took the position that the collective agreement provided a greater right or benefit only after the introduction of the two paid PEL days.

Arbitrator Nyman concluded that the collective agreement entitlements did not provide a greater right or benefit.

First, he found that a number of the paid entitlements under the collective agreement (shift premiums, break premiums, vacation pay, paid holidays, jury duty pay or the $1,000 annual security payment) could not be factored into the greater right or benefit analysis because they did not directly relate to the purpose underlying PEL.

Second, Arbitrator Nyman found it was significant that the employees were entitled to the unpaid PEL days prior to January 1, 2018. Specifically, he identified that “an improvement in the [ESA’s] minimum employment standards cannot result in the Collective Agreement suddenly becoming superior.”

Finally, he determined that the two paid PEL days could not be subdivided into “time off” and “pay” for the purpose of comparing the minimum standard to the collective agreement. Even though the collective agreement could potentially provide more time off and more pay for some of the events that might also qualify for PEL, he determined that “on the whole, when the breadth of the employment standard and the frequency with which it may be claimed are weighed against the narrower Collective Agreement benefits that may never be required, I conclude that the Collective Agreement does not provide a greater right or benefit than the two days of paid Personal Emergency Leave provided for in section 50 of the Act.”
