Reaching Out

Bill 124 Update and Recent Case Law Developments

Date: June 20, 2023

Dear Friends,

We are back with another edition of *Reaching Out*.

As we go to press, Sean Reginio reminds us that the Ontario Court of Appeal is hearing arguments this week in the government's appeal of the decision that struck down Bill 124 as unconstitutional. Stay tuned for future updates. It is possible this may not be finally resolved until the Supreme Court of Canada weighs in.

Samantha Sutherland summarizes a couple of recent arbitration awards that reinforce the importance of clear drafting when negotiating paid holiday language in your collective agreement.

Shauna Bartlett provides an update on the status of the decision in Empower Simcoe, a decision that provides helpful guidance on the intersection between the duty to accommodate and a group living home's obligation to provide a safe workplace and living environment.

Shauna also provides a case summary of a recent arbitration award that dealt with rapid antigen testing during the COVID-19 pandemic, and whether the time spent testing was considered "work" that needed to be compensated.

We hope that you find these articles helpful. As always, if you have any comments, or would like more information on any of these articles, or requests for future editions, please do not hesitate to contact us.

Please have a wonderful and relaxing summer.

Michael Smyth, Editor

Bill 124 Appeal Update

By: Sean Reginio

As all public sector employers know, on November 29, 2022, Justice Koehnen concluded that Bill 124, *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, was unconstitutional and declared it "void and of no effect." At the request of the parties, the Court deferred the consideration of any remedy to be awarded as a result of the legislation having been in effect since June 2019 to a future hearing.

The Ontario Government has filed an appeal of Justice Koehnen's decision, and this appeal is scheduled to be heard by the Ontario Court of Appeal from June 20 to June 23, 2023. There is no timeline established for when the decision will be rendered. Moreover, the unsuccessful party (or parties) at the Court of Appeal could seek leave to appeal to the Supreme Court of Canada.

With the hearing in the appeal scheduled to proceed shortly, we are getting closer to having a resolution of the issue.

The Importance of Clear Collective Agreement Language: Holiday Entitlements

By: Hicks Morley

A number of recent arbitral decisions have considered and interpreted collective agreement provisions regarding holiday entitlement for employees. The arbitral consensus is clear that whether a certain date will be considered a “holiday” under a collective agreement turns on the specific negotiated language. It is important for unionized employers to be aware of how their collective agreement language may potentially broaden the scope as to what may be considered a “holiday” for their employees.

This article looks at recent arbitration awards following the creation of two new holidays: the National Day for Truth and Reconciliation and the National Day of Mourning.

National Day for Truth and Reconciliation

In 2021, the Parliament of Canada passed Bill C-5, *An Act to amend the Bills of Exchange Act*, *the Interpretation Act and the Canada Labour Code, S.C. 2021*. Bill C-5 created the National Day for Truth and Reconciliation as a new federal holiday to be recognized on September 30 of each year.

The creation of a new federal holiday sparked a flurry of grievances, as a number of unions argued that provincially regulated employers had violated their collective agreements by failing to recognize the National Day for Truth and Reconciliation as a holiday. The genesis of these grievances was based on specific collective agreement language which recognized newly declared *federal* holidays as paid holidays under the collective agreement.

In *United Food and Commercial Workers Local 1006A v National Grocers Co. Ltd.*, the collective agreement recognized a number of prescribed holidays as paid holidays and also stated, “In the event that the federal or provincial governments should declare any other day(s) a legal holiday, the Company agrees to recognize such day(s) as a Paid Holiday.” Similarly, in *Vaughan Public Library Board v Canadian Union of Public Employees, Locals 905.17 (Part-time and Casual) and 905.18 (Full-time)*, the collective agreement provided for a number of prescribed paid holidays, as well as “any other day proclaimed as a holiday by the federal, provincial or municipal governments.”

In these cases, arbitrators have found that the National Day for Truth and Reconciliation should be recognized as a paid holiday under the collective agreement. The fact that the workplaces are not federally regulated is irrelevant—what is important is that, based on the language of their collective agreements, the parties have chosen to include federally proclaimed holidays in their list of paid holidays.

National Day of Mourning

On September 8, 2022, the Prime Minister declared September 19, 2022 to be a National Day of Mourning to mark the Queen’s passing. The Office of the Chief Human Resources Officer of the Government of Canada announced that September 19, 2022 would be a “one-time” holiday for persons employed by the Core Public Administration. The federal Minister of Labour issued a statement that “federally regulated employers are welcome to follow suit, but they are not required to do so.”

The National Day of Mourning was not added to the list of general holidays under the *Canada Labour Code*, or the list of holidays under the *Holiday Act*. It also has not been proclaimed a public holiday under the Ontario *Employment Standards Act*, *2000*.

There have been a number of arbitral decisions regarding the issue of whether the National Day of Mourning is a “holiday” under a collective agreement.

In *Canadian Union of Public Employees and Its Locals 905.17 (Part-Time and Casual) and 905.18 (Full-Time) and Vaughan Public Library Board (National Day of Mourning).* the union took the position that the National Day of Mourning should be recognized under the collective agreement as a paid holiday. The applicable collective agreement article stated that employees would be paid for prescribed holidays as set out in the article, as well as "any other day proclaimed by the federal, provincial or municipal governments." The arbitrator disagreed with the union and found that the National Day of Mourning is not a "holiday" as the day was not *proclaimed* to be a holiday by a legislative process. Further, there was very little evidence that the National Day of Mourning was to be treated as a holiday and the National Day of Mourning had not been made a holiday under any legislation.

The finding that the National Day of Mourning is not a "proclaimed holiday" was adopted by another Ontario arbitrator in *Malton Village of the Regional Municipality of Peel v Canadian Union of Public Employees, Local 966.* Here, the union argued that the National Day of Mourning fell within the language of the collective agreement, which stated that certain prescribed days will be recognized as paid holidays, as well as "any other day proclaimed as a holiday by the Federal, Provincial or Municipal Government." The arbitrator found that the word "proclaimed" has a specific legal definition—since the National Day of Mourning was not "proclaimed" as a holiday, there was no entitlement to it as a paid holiday under the collective agreement.

The holiday provisions of many collective agreements contain similar language: many recognize both newly *proclaimed* provincial and *federal* holidays. Employers should remain alert to these decisions and may wish to consider negotiating language during their next round of bargaining which clarifies the applicability of paid holidays for employees under their collective agreement.

UPDATE: Ontario Divisional Court Finds that Group Living Home Did Not Discriminate by Enforcing a No Visitor Policy During the COVID-19 Outbreak – Application for Leave to Appeal to the Supreme Court of Canada Filed

By: Shauna Bartlett

The previous edition of *Reaching Out*, published November 22, 2022, reviewed a decision of the Ontario Divisional Court (Court) that overturned findings of the Human Rights Tribunal of Ontario (Tribunal) regarding a group living home's visitor policy during the COVID-19 outbreak.

On September 22, 2022, the Divisional Court released *Empower Simcoe v. JL*, in which the Court set aside decisions of the Tribunal. The Court held that Empower Simcoe's COVID-19 visitor policy, which temporarily limited visits to essential personnel and was later updated to allow outdoor family visits with physical distancing measures in place, was not *prima facie* discriminatory.

There have been some significant developments since the last edition of *Reaching Out* was published:

- On October 6, 2022, JL, by his litigation guardian, filed an application for leave to appeal the decision of the Divisional Court. On January 27, 2023, the Court of Appeal for Ontario dismissed the application with costs to Empower Simcoe.
- On March 27, 2023, JL, by his litigation guardian, filed an application for leave to appeal to the Supreme Court of Canada.

We will provide updates in future editions of *Reaching Out* as the Supreme Court of Canada decides whether to grant the applicant's request.

Grievance Settlement Board Rules Time Spent Completing Mandatory Rapid Antigen Testing is Compensable "Work"

By: Shauna Bartlett

On October 26, 2022, the Ontario Grievance Settlement Board released a decision related to mandatory rapid antigen testing.

In *Ontario Public Service Employees Union (Union) v Ontario (Solicitor General)*, Arbitrator McLean concludes that where rapid antigen testing is a mandatory requirement of employees, regardless of vaccination status, the time spent administering the test and submitting the test results constitutes “work” that must be compensated.

Facts

The Ontario government introduced enhanced safety measures to prevent the spread of COVID-19 in congregate institutions such as group living homes or correctional facilities where inmates, patients and residents had a limited ability to protect themselves against the virus. Among the measures introduced was the requirement for employees to test for COVID-19 on a regular basis.

Under this scheme, employees, regardless of vaccination status, were supplied with rapid antigen test kits and directed to self-administer the test and report their test results (via a smartphone application) within an allotted window of time before attending work. The entire testing and reporting process could take between 15–25 minutes.

It is important to note that virtually all of the employees subjected to this testing regime were twice vaccinated.

Issue

Arbitrator McLean answers three questions:

1. Is the rapid antigen test process “work” for which employees should be paid?
2. Does the testing time attract call-back pay?
3. Should employees be reimbursed for additional internet data costs incurred in submitting the test results?

The union argued that testing and reporting are work which attracts the right to compensation. The union contended that the testing and reporting processes interfered with an employee’s right to enjoy their time off from work, since the employee was required to test and report on their own time (i.e., outside of working hours because attendance at work was not permitted until a negative test result was submitted).

In response, the employer argued that testing and reporting are processes which an employee must go through to be ready to attend work—akin to getting dressed in a work uniform or shaving—in order to bring oneself in compliance with work requirements.

Decision

Arbitrator McLean first considered the applicable test for determining whether a required activity constitutes “work”: “Generally speaking, where an employer makes a claim on an employee’s time, the employee is entitled to compensation.” Here, Arbitrator McLean notes, it is clear that the employer has made a claim on employee time as the employer has insisted that rapid antigen tests are administered and results are reported outside of working hours. But is this claim on time compensable?

Arbitrator McLean distinguishes the circumstances at issue from situations of mandatory testing affecting unvaccinated employees:

…those cases all involve circumstances where employees had a choice of whether to vaccinate or to test. If the employee became fully vaccinated, then there was no requirement to spend personal time engaged in regular covid testing. The employees therefore had a choice, and it was reasonable for the employers not to have to pay for the time associated with that choice…On the facts before me, there is no such choice; the employees are vaccinated, and they must do regular testing.

Arbitrator McLean further notes that the employer was free to choose a simpler method of reporting (e.g. an email message, photo evidence, the honour system, etc.), but, instead, the employer required employees to input detailed information about their symptoms and test results via a smartphone application, which, Arbitrator McLean surmised, added time to the overall process.

This, added to the time for taking the test is not insignificant, and must be accomplished three times per week. I do not mean to criticize the employer's choice of reporting mechanism. One can imagine all sorts of good reasons the employer chose the application it did. However, the effect of that choice was to impose a burden on employees during off work time.

Arbitrator McLean concluded that the time spent testing and reporting was not *de minimus,* as some previous arbitral decisions had found, and the fact that employees were required to complete these processes multiple times a week further supported a determination that this time was "work" for which employees should be compensated.

Having found that the testing and reporting processes constitute work, Arbitrator McLean then considered whether this time also attracts "Call Back Pay" under the parties' collective agreement—he decided it did not. According to Arbitrator McLean, the Call Back Pay provision of the collective agreement was not engaged in the circumstances since the article required "employer contact as a triggering event" and this was not occurring.

Finally, Arbitrator McLean considered whether employees should be reimbursed for data costs associated with reporting test results. Arbitrator McLean found that reimbursement is appropriate only in very limited circumstances where there is no reasonable way to submit the testing using free/unlimited wi-fi that is "ubiquitous in the province."

Key Takeaways

Employers have the right to manage the workplace as they see fit; however, employers must balance their operational needs with employee rights protected by law, by contract, or by collective agreement and implement practices that are minimally impairing. As this decision demonstrates, even a well-intentioned exercise of an employer's right to manage the workplace can be found to wrongfully encroach on employee rights.