MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

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November 2019 Vol. XVIII No. 4

Labour Day Came Early: Significant changes to the *Canada Labour Code* now in force

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Labour Day came early, as significant amendments to Part III of the *Canada Labour Code* ("*Code*") were proclaimed into force effective **September 1, 2019**, substantially changing the workplace landscape for federally-regulated employers.

Of particular importance are the new rules and requirements related to hours of work, the right to a flexible work arrangement, and new **paid** leave entitlements (for a detailed discussion of the full range of amendments, please see our Briefing Note - Amendments to Part III of the *Canada Labour Code* - July 9, 2019).

Hours of Work

As of September 1, 2019, a federally-regulated employee is now entitled to:

- An unpaid break of 30 minutes during every period of five consecutive hours of work. If the employer requires the employee to be available during the break, the employee must be paid for the break.
- A rest period of eight consecutive hours between work periods or shifts.
- 96 hours' written notice of the employee's shift schedule. If an employer fails to provide notice, an employee may refuse to work any period or shift that starts within 96 hours from the time the schedule was provided. Importantly, this section does not apply to an employer under a collective agreement if that agreement specifies an alternate time frame to provide a work schedule or states that this section of the *Code* does not apply to that employee.
- 24 hours' written notice of a shift change, including the addition of a work period or shift.

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The *Code* provides exceptions to these hours of work provisions, if it is necessary for an employer to deal with a situation:

- The employer could not have reasonably foreseen, and
- Could reasonably be expected to present an imminent or serious threat (a) to life, health or safety of any person, (b) of damage to or loss of property, or (c) of serious interference with the ordinary working of the employer's industrial establishment.

In additions, the Minister of Labour ("Minister") may make regulations that exempt or modify these provisions for certain classes of employees if:

- The provisions cannot reasonably be applied, or
- Their application would be unduly prejudicial to the interests of certain classes of employees or seriously detrimental to the industrial establishment's operations.

The earliest the Minister is expected to introduce regulations is 2020.

To address this absence of regulatory guidance, the Federal Government has published an interpretation policy guideline ("IPG") which outlines the scope of application of the new hours of work provisions until the coming into force of regulations. The IPG provides interim exemptions from some or all of the new hours of work provisions for certain classes of employees in various industrial sectors such as air transportation and airports, rail, and road transportation.[1]

Right to Flexible Work Arrangement

After six months of employment, an employee has the right to request, in writing, a change to work hours, schedule, location of work, or any other prescribed term and condition of employment, and an employer is required to respond to the request within 30 days. A request may only be refused if:

- It would result in additional cost that would be a burden on the employer, or
- It would have a detrimental impact on quality or quantity of work, ability to meet customer demand, or any other aspect of performance within the employer's establishment, or
- The employer is unable to reorganize work or recruit additional employees to manage the change, or
- There would be insufficient work available for the employee if the request was granted.

An employer is prohibited from reprising against an employee for making a request, or taking the request into account in deciding whether to train or promote an employee.

Expansion of Paid and Unpaid Leave

The amendments to the *Code* include a variety of new leave provisions:

- **Leave for Victim of Family Violence:** An employee is entitled to ten days of leave each calendar year if the employee is a victim of family violence or is the parent of a child who is the victim of family violence. After three consecutive months of employment, the first five leave days are with pay.
- **Personal Leave:** An employee is entitled to five days of personal leave each calendar year to treat his or her illness or injury; carry out responsibilities related to the health or care of any prescribed family member; carry out responsibilities related to the education of any family member under 18; address an urgent matter concerning the employee or an employee's family member; attend the employee's citizenship ceremony; and any other prescribed reason. After three consecutive months of employment, the first three days of leave are with pay.
- **Extended Bereavement Leave:** An employee is entitled to five days of bereavement leave following the death of an immediate family member. After three consecutive months of employment, the first three days are with pay.

These leaves are **not** prorated for 2019, meaning an employee may take the full period of leave for 2019 beginning September 1, 2019.

Navigating the *Code* Amendments – Tips for Employers

Many federally-regulated employers already have collective agreements, employment contracts, and policies and procedures in place that address leaves of absence and hours of work. It is imperative to compare these documents with the new and amended *Code* provisions to ensure compliance.

Federally-regulated employers will also want to know whether the interim exemptions applicable to hours of work apply to their workforces and, ultimately, whether the results of the upcoming federal election will affect those exemptions.

Note: This article highlights only some of the amendments to the *Code* which took effect September 1, 2019. Federally-regulated employers are encouraged to consult with Sherrard Kuzz LLP for information on all of the amendments and how they may impact the workplace.

To learn more and for assistance contact Sherrard Kuzz LLP.

[1]The IPG reflects the Federal Government's intentions until regulations come into force. The IPG may not be reflected in regulations ultimately passed into force.

DID YOU KNOW?

On January 1, 2020, the new Workplace Safety and Insurance ("WSIB") Rate Framework will take effect. However, non-profit organizations in Ontario, many of which were bracing for a significant premium increase, have had their WSIB rates frozen for a five year period. To learn more and for assistance with all WSIB-related matters, contact Sherrard Kuzz LLP.

Accommodation Need Not Be Perfect So Long As It Is Reasonable

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Whether an employer's offer of accommodation is reasonable can be difficult to determine. On the bright side a recent decision from the Human Rights Tribunal of Ontario[1] ("Tribunal") argued by the writer and my colleague, Jeffrey Stewart, affirmed that accommodation need not be perfect so long as it is reasonable, and further that the duty to accommodate does not mean an employer must offer a position that accommodates an employee's *preferences*.

What Happened?

The employee was a supervisor - security guard with approximately 13 years of excellent service working at a regional hospital in Kingston, Ontario. In 2017, the employee began to suffer anxiety as a result of increased demands to work with a more challenging patient population. The employee's physician confirmed she was unable to work in an environment of conflict or aggressive situations and she took a medical leave of absence.

When the employee was well enough to return to work her employer (the security company) considered arrangements to accommodate her medical restrictions. This was a challenging task given the primary function of the employee's position was to respond to and assist with medical codes and emergency alarms, accompanied by a high risk of conflict or aggression.

Exploring Accommodation

In its attempt to offer reasonable accommodation the employer was faced with additional demands from the employee. She wanted her rate of pay protected and to remain a supervisor (non-union) and on a regular day-shift during the week (no evenings and weekends). The employee admitted in the hearing her request for a regular day-shift was not connected to her medical restrictions, but rather a request that suited her family situation.

The employer made inquiries of its hospital client to change the employee's role to an administrative function with no guarding responsibilities. The hospital was not able to agree to that change. The employer also looked for alternative positions with other clients in the region, but there were no positions that fit the employee's medical restrictions. The employer informed the employee there would be a larger pool of options if she was available for 12-hour shifts, night-shifts or weekends. The employee did not revise her request.

The Offers

The employer offered the employee two accommodated positions:

1. The first position was a closed-room surveillance position in which duties could be shifted so that the employee would not be required to leave the room to respond to calls. However, the employee would be required to work 12-hour shifts, rotating days and nights. The employee refused this position.
2. The second position was to provide security as a parking co-ordinator at a different regional hospital in Brockville. The position had regular day-shifts, Monday through Friday, and other guards would handle conflict. The employee was interested in this position but only if her rate of pay was protected, she was compensated for a longer commute from Kingston to Brockville, and she could apply for other positions that might subsequently arise. The employer was not contractually obliged to protect the employee's rate of pay but agreed to do so. However, the employer did not agree to compensate the employee for the longer commute. The employee rejected the offer and there were no further meaningful exchanges between the parties until the Application was brought to the Tribunal.

Reasonable Accommodation?

Although the process of finding reasonable accommodation took longer than the employee desired, the Tribunal found the employer made considerable efforts, over the course of two months, to locate options for the employee. At times, the employee asserted she needed a face-to-face meeting and consultation with a "return to work specialist" to better understand and facilitate accommodation. However, the Tribunal found there was no evidence of any confusion regarding the employee's medical restrictions. The employer had therefore met its procedural duty to identify reasonable accommodation for the employee.

Significantly, the Tribunal agreed with the employer that accommodation need not be perfect so long as it is reasonable. And further, that the duty to accommodate does not mean an employer must offer a position that accommodates an employee's *preferences* (that is, an employee may experience some hardship in accommodation). In this case, while the employer considered the employee's requests regarding pay and shift schedule, it was not required to do so.

Ultimately, the Tribunal found the employee refused the accommodated positions for reasons unrelated to her disability. She had therefore failed in her duty to accept reasonable accommodation, the employer had discharged its duty to accommodate and the Application was dismissed.

Tips for Employers

While every case will be decided on its own unique facts, this decision is important because it confirms the following basic principles:

- An employer must have detailed, specific and timely information about an employee's medical restrictions and limitations to determine whether accommodation is necessary and, if it is, how it may be facilitated.
- There is no "standard" process to determine appropriate accommodation (such as a "face to face meeting" or the involvement of a particular "return to work specialist"). Each case is unique.
- Accommodation need not be perfect so long as it is reasonable.
- Although it may be good-practice to keep looking for accommodation with which all parties are happy, once an employee has refused an offer of *reasonable* accommodation the employer has discharged its duty to accommodate. There is no legal obligation to do more.

To learn more and for assistance, contact Sherrard Kuzz LLP.

[1] *Coates v. G4S Secure Solutions (Canada) Ltd.*, 2018 HRTO 1005 (Bouchard).

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

2019 Year in Review...
And what to expect in 2020

2019 ushered in many important changes to the employment and labour landscape in Ontario and across Canada. Join us as we discuss how these changes impact employers, and proactive steps to minimize the negative effects. Topics include:

1. Legislative Update

- Bill 66 amendments to the Ontario *Employment Standards Act, 2000*.
- Changes to the federal *Canada Labour Code*.

2. Harassment in the Workplace

- Can an employee launch a stand-alone lawsuit for harassment? What does this mean for employers?
- "Forum shopping" and the potential for multiple claims at the same time.

3. Drugs and Alcohol in the Workplace

- Cannabis legalization- where do we stand?
- Trends in "addiction" case law.

4. Trends in Employment Agreements

- New case law on the enforceability of termination provisions.
- The perils of a fixed term agreement.

DATE: **Wednesday December 4, 2019; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)
VENUE: **Mississauga Convention Centre - 75 Derry Road West, Mississauga**
COST: Complimentary
REGISTER: **By November 22, 2019 at www.sherrardkuzz.com/events/?data-category=hreview**

Law Society of Ontario, CPD Hours: This seminar may be applied toward 1.5 general CPD hours.
HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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