INTRODUCTION

This issue covers key updates in labour relations, human rights, and privacy, along with commentary from our team on what these changes mean for employees and trade unions.

ANNOUNCEMENTS

Celebrating 50 Years of Advocacy

This year, CaleyWray is celebrating its 50th anniversary, marking half a century of service to trade unions and their members.

Since our founding in 1975, we have had the honor of providing our clients with trusted counsel, strategic representation, and a steadfast commitment to workplace justice.

To our clients, colleagues, and community: thank you for being part of our journey. We look forward to the next 50 years.

New Associate

CaleyWray is pleased to welcome Matt Carrieri to our team of associates. Matt brings significant expertise in a wide range of labour relations matters, including collective bargaining, workplace investigations, and grievance arbitration. Matt will play a key role in serving our clients. Welcome, Matt!

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As always, please feel free to contact us with any questions you may have in relation to any of the topics covered in this Newsletter.

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A. MORE ON THE CONSTITUTIONALITY OF BACK-TO-WORK LEGISLATION

Samir Silvestri

On July 11, 2024, the Ontario Superior Court of Justice found that the *Colleges of Applied Arts and Technology Labour Dispute Resolution Act* (the "*Act*") did not violate section 2(d) of the *Charter*. The *Act* ended the longest college-sector strike in Ontario's history and imposed mediation-arbitration to settle all outstanding issues. This recent decision adds further clarification to the growing body of *Charter* jurisprudence concerning the constitutionality of back-to-work legislation, and is of particular importance to any union anticipating or planning for legal strike action in the near future.

Background

Collective bargaining in Ontario's college sector is governed by the *Colleges Collective Bargaining Act* (the "*CCBA*"). The *CCBA* is a sector-specific labour legislation which defines the parties to collective bargaining, their respective roles, the bargaining process, and the prerequisites to strike action. OPSEU is the collective bargaining agent for approximately 19,000 academic employees across the 24 colleges governed by the *CCBA*. All 24 colleges are represented by the College Employer Council (the "CEC") in collective bargaining with OPSEU.

After bargaining for five-months, OPSEU and the CEC were unable to reach agreement on three issues: (1) proposals for the creation of an academic senate for each college; (2) OPSEU's proposal for a guarantee of college faculty academic freedom to be written into the collective agreement; and (3) OPSEU's proposal for a reduction in the number of part-time faculty. Conciliation was unsuccessful, and a strike started on October 16, 2017.

On November 6, 2017, a final-offer vote was held. 86% of OPSEU's voters (95% of the bargaining unit participated in the vote) rejected the CEC's final offer.

Shortly after, with the strike approaching the five-week mark, the provincial government introduced the *Act*. This was despite the fact that the Ontario government had determined that the strike could go on for six weeks before a critical stage was reached, and the educational goals of the colleges would be in jeopardy. However, by week five, the strike was the longest running labour dispute in the history of Ontario's college sector.

On November 19, 2017, the *Act* was implemented. It terminated the strike and required all outstanding bargaining disputes between OPSEU and the Council to be resolved by neutral binding mediation-arbitration by William Kaplan. Notably, unlike some recent attempts at back-to-work legislation, the *Act* did not purport to pre-determine any substantive outcome for the arbitrator to endorse.

The Decision

OPSEU challenged the *Act* on the basis that the termination of the strike and the imposition of mandatory mediation-arbitration resulted in a substantial interference of its members' freedom of association.

Justice E.M. Morgan held that in order to find a substantial interference with the freedom of association, the legislation must seriously undermine the activity of workers joining together to pursue the common goal of negotiating workplace conditions and terms of employment. Importantly, this analysis is very fact and circumstance-specific. In the case of back-to-work legislation, one of the key factors is timing. For example, legislation which ends a strike while negotiations are ongoing and still making progress is more likely to violate the freedom of association than legislation which ends a strike after an unbreakable impasse has been reached.

Justice Morgan found that it was a "toss-up" on the issue of whether the *Act* had interfered with ongoing, fruitful, bargaining. The facts suggested that introducing the legislation at the 5-week rather than the 6-week point might have driven the nail into the coffin on collective bargaining, but also that the bargaining was, by that point, already dead and buried. The parties had been negotiating intensively for over 5 months and OPSEU's members had resoundingly rejected the CEC's final offer. In essence, the provincial government had to make a judgement call concerning the chances that continuing the strike would result in a resolution. Justice Morgan concluded that such circumstances were found to be more indicative of an unsolvable bargaining impasse than the interruption of strenuous, but nevertheless productive, collective bargaining.

Justice Morgan also concluded that even if the *Act* violated the freedom of association, it was a justifiable infringement under section 1 of the *Charter*. This was because the objective of returning college students to class was key to both salvaging the school year and ensuring professional accreditation programs, which required degrees from the colleges, would not be disrupted. Justice Morgan viewed these potential harms as serious and personal economic issues that warranted legislative intervention.

Justice Morgan also noted that an infringement on the right to strike can be justified on four grounds: interruption of essential services, vital state administration, clear bargaining deadlocks, or national crisis. Justice Mogran did not comment on whether colleges are an essential service, noting that the evidence clearly demonstrated the parties were at a deadlock.

Accordingly, the *Act* did not constitute an infringement on the freedom of association, and even if it did, the conduct of the provincial government in enacting it, as well as the circumstances surrounding the legislation, could justify any such infringement.

Key Takeaways

The decision in *OPSEU v. Ontario* highlights the importance of taking into account the full range of circumstances when determining if any labour legislation violates the *Charter* protected freedom of association. The *Act* was introduced at a time when there was an unresolvable bargaining impasse. Further, the evidence demonstrated that there was imminent serious threat to college students should the strike have continued beyond five weeks. This contrasted the *Act* from other back-to-work legislation which was previously found to be unconstitutional. Examples of legislative features which could lead to a finding of unconstitutionality include:

- Legislation which prohibits the freedom to strike but is not accompanied by a mechanism for dispute resolution by a third party (*Reference Re Public Service Employee Relations Act* (Alta.), [1987] 1 SCR 313)

- Legislation which imposes a pre-determined outcome or fixes collective bargaining unfairly in favour of the employer (*Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391)

- Legislation imposed at a time when there is clearly some prospect of a freely negotiated solution without legislative intervention (*Canadian Union of Postal Workers v. Canada*, 2016 ONSC 418)

Accordingly, in certain circumstances, governments have a significant range of tools at their disposal should they wish to put an end to any strike. Unfortunately, not every interference with the right to strike will rise to a constitutional violation. The assessment of whether the freedom of association has been breached is done on a case-by-case basis, taking into account the circumstances and context of the alleged violation.

If you have any questions about the ruling in *OPSEU v. Ontario,* or the effect of the freedom of association on the right to strike, please contact any one of our lawyers.

B. COURTS AWARD DAMAGES FOR FAILURE TO PROVIDE TIMELY RECORD OF EMPLOYMENT

Ethan Lewis

Employment Insurance ("EI") is one of the most important lifelines extended to individuals who find themselves unemployed. To receive EI benefits, an employee must meet several qualifying criteria, and the employer must submit a Record of Employment ("ROE") to Service Canada. The law requires an employer to submit an ROE within 5 calendar days of the first day an employee experiences an interruption of earnings lasting 7 days or more.

What happens if an employer fails to issue an ROE on time, or if they issue an inaccurate ROE? The employer may be subject to prosecution and fines, but this rarely occurs in practice. In any event, the employer paying a fine does nothing to compensate the employee for the delay.

In response to these issues, courts have started to award "inconvenience" damages where employers fail to issue ROEs in a timely manner.

The most detailed reasoning on this issue is found in *Ellis v Artsmarketing Services Inc.,* 2017 CanLII 51563. In that case, the plaintiff was not issued an ROE for about 5 months after her termination. When the ROE was finally issued, the reason for termination was listed as "quit," thereby disentitling her from EI benefits. The plaintiff led evidence that she was required to borrow money from others after being denied benefits. The defendant submitted that, in its view, the plaintiff had resigned, and it was not required to file an ROE. The Court held that even if the plaintiff had quit, an ROE was still required. The Court awarded an additional $1,000 as damages to be paid to the plaintiff on account of the hardship she faced due to the employer's delay.

This issue arose again in *Osmani v Universal Structural Restorations Ltd.*, 2022 ONSC 6979. In that case, the plaintiff was a temporary foreign worker who alleged he was physically and verbally abused by his employer. While the Court awarded the plaintiff substantial damages in respect of the employer's abuse, it dismissed the claim for inconvenience damages. In doing so, the Court distinguished *Ellis* by noting that the ROE was not maliciously withheld, and further, there was no evidence that the plaintiff was making efforts to apply for EI. The Court nevertheless endorsed the principle that it would award inconvenience damages related to a late ROE in appropriate cases.

The most recent decision on the issue is *Khanom v. Idealogic PDS Inc.*, 2024 ONSC 5131. In that case, the plaintiff was terminated after requesting an accommodation related to COVID-19. After the termination, the employer indicated on the ROE that the plaintiff had quit, which resulted in a 10-month delay before the plaintiff could access EI benefits. The Court awarded the plaintiff $1,000 on the same basis as *Ellis*.

Based on the three decisions described above, it is now clear that courts will, in appropriate circumstances, issue damages for a failure to file an accurate ROE in a timely manner. Moreover, in the cases where courts have awarded damages, the amount has been precisely $1,000. We would expect to see the amount of compensation vary in future matters based on the degree of injury to the plaintiff.

A final point worth considering is that there has not yet been an arbitral decision where an arbitrator awarded inconvenience damages in this manner. Arbitrators are not necessarily required to follow the reasoning of the courts, and it remains to be tested whether an arbitrator would award damages in the same manner. However, given that the courts have shown support for the concept, these are waters which could and should be tested.

C. ARBITRATOR RULES EMPLOYEE NOT REQUIRED TO SELF-ACCOMMODATE FOR FAMILY STATUS BY REDUCING WORK AT SECOND AND THIRD JOBS

Erin Carr

Overview

In *Medavie EMS Ontario - Chatham Kent (MEMSO-CK) v. Service Employees International Union, Local 1 Canada*, Arbitrator Howard Snow ruled that Medavie EMS - Chatham Kent discriminated against a part time paramedic by applying a minimum shift availability requirement in a blanket fashion, despite the Grievor's request for family status accommodations.

Background

Prior to going on parental leave, the Grievor held three jobs as a paramedic. He worked as a full-time paramedic for Windsor EMS, a part time paramedic for London EMS, and a part time paramedic for Medavie EMS (the "Employer").

Following the birth of his daughter in October 2021, the Grievor's wife took parental leave, and later, the Grievor took parental leave. The Grievor and his wife applied for childcare but were only able to get on a waitlist. When it was time for the Grievor to return from leave, he was the primary caregiver for his daughter. His wife had already returned to her full-time job as a police officer.

The Grievor requested accommodations in relation to his availability from each of his employers. He advised Medavie EMS that he could not meet the availability requirements in the collective agreement, which required him to submit availability 2 months in advance, with at least 10 workable shifts per month, with at least four being weekend shifts. Given the fact that he did not have reliable childcare, the Grievor could only offer availability for Medavie EMS every Sunday.

While London EMS and Windsor EMS accommodated the Grievor and returned him to work, Medavie EMS took the position that the Grievor was not entitled to accommodations because he could have met the availability requirements if he did not work as a paramedic elsewhere. When Medavie EMS eventually returned the Grievor to work, it disciplined him for failing to meet the minimum availability requirements.

The primary issue at the hearing was whether the Grievor faced an adverse impact related to his family status (the second and third parts of the *prima facie* discrimination test).

The Union argued that the Grievor faced an adverse impact when the Employer applied the availability requirements in a blanket fashion, resulting in discipline, and when it failed to return the Grievor to work in a timely fashion. According to the Union, the Grievor's

childcare obligations were a factor in his adverse treatment because the reason the Grievor could not meet the minimum availability requirements was that he did not have childcare. The fact that the Grievor worked elsewhere did not impact his right to accommodation, because the only reason he was able to work elsewhere was because his other employers allowed him to pick up shifts on short notice. Medavie EMS did not allow that. In any event, the Union submitted that it would be contrary to the express purpose of the *Human Rights Code* if the Grievor was only entitled to family status accommodations after he self-accommodated by quitting his other jobs. The Union also relied on the fact that the Grievor had been disciplined for failing to meet the availability requirements, while other employees were "given grace" (as the Employer put it).

The Employer took the position that its duty to accommodate was never triggered. The Employer submitted that there was no adverse impact connected to the Grievor's childcare responsibilities. The Employer argued that the Grievor could have complied with the collective agreement, and that it was the Grievor's preference for other employment, not his childcare responsibilities, that prevented him from doing so. According to the Employer, the Grievor's choices were based on work location, distance to work, and pay, and were not related to family status. The Employer acknowledged that it would not have faced undue hardship by accommodating the Grievor. It relied entirely on its argument that the Grievor was not entitled to accommodations to begin with.

Decision

Arbitrator Snow allowed the Union's grievance. According to Arbitrator Snow, the Grievor was not required to self-accommodate by reducing his work in his other jobs to comply with the minimum availability requirements in the collective agreement:

> The grievor had employment elsewhere for the entire time he worked for the Employer. From the Employer's evidence it is common for full-time paramedics to have part-time paramedic employment with other employers. Mr. Gaudette, the Employer's Operations Manager and the Employer's only witness, testified that he was employed part-time with Windsor EMS. He also testified that other members of management, supervisors, and paramedics had part-time paramedic employment elsewhere. In my view the intent of the *Code*, as is implicit in the text of the *Code* itself and explicit in the preamble to the *Code*, is to respect human dignity and support full participation in employment. In this situation, I am unable to interpret the *Code* as requiring the grievor to reduce his accommodated employment in order to comply with this part-time Employer's collective agreement. That is, it is not necessary for the grievor to resign, take a leave of absence from, or otherwise reduce working for Windsor EMS in order to remove any possible adverse impact from an acknowledged family status need.

Arbitrator Snow went on to award the Grievor $2,000 in aggravated damages, on the basis that the Grievor's had been singled out for adverse treatment:

> I find this was a clear case where the grievor was entitled to accommodation. His human rights were ignored. Moreover the grievor appears to have been singled out for coaching and/or discipline. There were other employees who did not comply with the availability requirements but none of them were either coached or disciplined during this time period. Whatever the reason, I find the grievor was singled out for adverse treatment, while other employees were given a grace period. In addition, had the grievor been accommodated as he requested, I conclude he would not have needed to seek out shifts on short notice from London EMS and would have been able to work closer to his home leading to less travel time and less expense. Unlike calculating damages for lost income, it is more difficult to quantify these types of damages. Considering all the factors I award aggravated damages in the amount of two thousand dollars ($2,000.00).

Comment

Arbitrator Snow's decision confirms that, under the *Human Rights Code*, employees are not required to find a solution to their own conflicts between their family responsibilities and their work obligations before the duty to accommodate is triggered. The test for *prima facie* discrimination based on family status is the same as the test for *prima facie* discrimination based on all other *Code* grounds – self-accommodation is not required.

D. REGISTRY TAX ON PERSONAL SUPPORT WORKERS: THE HEALTH AND SUPPORTIVE CARE PROVIDERS OVERSIGHT AUTHORITY ACT

Zainab Y. Aderibigbe

Overview

The *Health and Supportive Care Providers Oversight Authority Act, 2021* (the "*Act*") was introduced to establish a regulatory body for health and supportive care providers in Ontario. Its stated purpose is to enhance oversight, standardize practices, and ensure the quality of care delivered by healthcare workers. However, rather than addressing the most urgent challenges faced by personal support workers (PSWs) including low wages, unsafe working conditions, and severe understaffing, the legislation imposes additional financial and bureaucratic burdens on an already struggling workforce.

This raises a critical question: Is the *Act* truly designed to support PSWs and improve healthcare, or does it function as another revenue generating mechanism at the expense of underpaid workers?

A key provision of the *Act* is the creation of a provincial registry for PSWs, a measure that has been met with fierce opposition from major healthcare unions. While registration is currently voluntary, it is widely expected to become mandatory in the future. SEIU Healthcare, the Ontario Council of Hospital Unions/CUPE, and Unifor, which in total represent 140,000 healthcare workers across Ontario, have strongly condemned the government's decision to impose a mandatory registry tax on PSWs. The unions argue that this measure not only increases financial pressure on PSWs but also serves to isolate workers and erode their access to union representation.

Healthcare leaders warn that the registry, as currently designed, fails to protect PSWs and instead exacerbates the economic and structural issues they already face.

Sarah Correia, Director of Hospitals & Labour Relations at SEIU Healthcare, stated:

> Imposing a regulatory tax on already underpaid PSWs will only add to their financial strain at a time of economic hardship. Healthcare workers deserve meaningful oversight, fair representation, and improved wage support. However, in its current form, Ontario's *Health and Supportive Care Providers Oversight Authority Act* exacerbates the vulnerabilities of PSWs rather than addressing their most pressing needs.

Comment

If the provincial government is genuinely committed to strengthening Ontario's healthcare sector, it must focus on sustainable funding, fair wages, and improved working conditions

for PSWs – not bureaucratic fees and barriers that further marginalize frontline workers. Until these fundamental concerns are addressed, the *Health and Supportive Care Providers Oversight Authority Act* will remain a deeply flawed piece of legislation, one that places an unfair burden on those who play a crucial role in Ontario's healthcare system.

E. GOOGLE DOCUMENTS AND EMPLOYER DEVICES: THE SUPREME COURT CONFIRMS *CHARTER* RIGHTS APPLY TO TEACHERS

Sukhmani Virdi

On June 21, 2024, the Supreme Court of Canada in *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 (CanLII), upheld a decision of the Court of Appeal for Ontario, in which the Court of Appeal confirmed the *Canadian Charter of Rights and Freedoms* applied to public school board teachers.

The underlying case involved a grievance concerning a principal of a public school who took photographs of a Google Document that was displayed on a school laptop. The Google Document was a shared document between two teachers, protected by password, and stored in a Google Drive (it was not stored locally on the school laptop). The laptop was unlocked, and the principal had not only hit the mouse, thereby bringing the Google Document on screen, but also scrolled through the Google Document and took photographs of it.

The principal disciplined the two teachers based on the contents of the Google Document. The Union grieved the disciplines and referred the grievance to arbitration.

The Arbitrator dismissed the grievance, finding that the Grievors left the Google Document in "plain sight" as the laptop was unlocked. The Arbitrator found that the principal was authorized to access the laptop pursuant to the *Education Act*, and that such access was not unreasonable in the circumstances.

On judicial review, a majority of the Divisional Court upheld the decision, finding that the Arbitrator's decision was reasonable. The Divisional Court held that no *Charter* analysis was necessary because the *Charter* did not apply to employees.

On appeal, the Court of Appeal for Ontario unanimously disagreed. The Court of Appeal found that the majority of the Divisional Court erred in finding that the *Charter* did not apply to public school teachers. The Court of Appeal found that the Grievors had a reasonable expectation of privacy, particularly since the Google Document was not stored or saved on the school laptop, but rather in the Google Drive. The Court of Appeal emphasized that the Grievors did all they could to protect their privacy. The principal violated their reasonable expectation of privacy by not only accessing the Google Document and reading its contents, but also by taking photographs.

A majority of the Supreme Court agreed with the Court of Appeal. The Supreme Court emphasized that a right to reasonable expectation of privacy by way of section 8 of the *Charter* is distinct from an arbitral right to privacy under the collective agreement. Regardless the language of a collective agreement, reviewing courts could not substitute the *Charter* right with a collective agreement right.

The Supreme Court also clarified that the standard of review that ought to be applied in such circumstances is that of correctness. It is not sufficient to determine whether the Arbitrator's decision on the *Charter* violation was reasonable; to the decision on the *Charter* violation must meet the correctness standard.

Given the broader interest in the case, the Supreme Court also made the following general comments about privacy in the workplace:

- Section 8 of the *Charter* provides protection against unreasonable search and seizure beyond the criminal and quasi-criminal context. However, the analysis must be contextualized to the labour relations context.

- Determining whether there is a reasonable expectation of privacy depends on the "totality of the circumstances."

- Determining whether the search is reasonable may also involve consideration of the terms of the collective agreement. This may involve a balancing of interests analysis.

What remains consistent is that a *Charter* analysis will always be fact specific. What may be reasonable in one set of circumstances may be unreasonable in another.

F. ARBITRATOR RULES NURSE NOT ENTITLED TO COMMUNICABLE DISEASE PAID LEAVE UNLESS REQUIRED TO SELF-ISOLATE

Samir Silvestri

On October 10, 2024, Arbitrator Kaplan ruled that a nurse will only be entitled to communicable disease paid leave when they are required to isolate by hospital policy, by law, or at the direction of a public health authority.

The Decision

In *North York General Hospital v. ONA*, Arbitrator Kaplan addressed the application of a new collective agreement provision providing paid communicable disease isolation leave. The provision read:

> Effective July 20, 2023, employees who are absent from work due to a communicable disease and required to quarantine or isolate due to:
>
> i) The employer's policy, and/or
>
> ii) Operation of law and/or
>
> iii) Direction of public health officials,
>
> shall be entitled to salary continuation for the duration of the quarantine.

The Grievor was a nurse employed at North York General Hospital. The Grievor tested positive for COVID-19 on July 18, 2023. She reported her positive test to the Hospital the following day, using the Hospital's online COVID-19 questionnaire. After completing the questionnaire, the Grievor received a pop-up message which read: "NOT CLEARED to return to work at this time." The pop-up further stated:

> Clearance to return to work requires significant symptom improvement including:
>
> - No fever for more than 24 hours without the use of fever-reducing medication
> - No diarrhea/vomiting for at least 48 hours without taking any anti-diarrheal mediation
> - Significant improvement of other symptoms not mentioned above (no development of new symptoms, feeling well enough to work)

The Grievor subsequently received a call from the Hospital's occupational health staff, advising her that she should complete an online clearance form once she was symptom free, and would subsequently be returned to work. Following her return, the Grievor requested quarantine/isolation pay in accordance with the new collective agreement provision, and her request was denied.

The Union argued that while there was no public health order requiring isolation at the time the Grievor tested positive, online material from Toronto Public Health instructed someone with COVID-19 to stay home & self-isolate. Further, the Hospital's direction to stay home constituted a "policy" which required the Grievor to isolate.

The Hospital argued that while there was no dispute that the Grievor had a communicable disease, she was under no obligation to isolate as described in the new collective agreement provision. The Hospital further asserted that simply requiring the Grievor to remain off work until their symptoms improve was not a requirement to isolate.

Arbitrator Kaplan found that the plain and ordinary meaning of the new collective agreement provision entitled a nurse to pay only in the three situations set out therein. He agreed with the Employer that none of the three situations applied and dismissed the grievance. Arbitrator Kaplan found that the Hospital's direction was simply an instruction for the Grievor to stay at home until her symptoms abated, and not a requirement to isolate. This was contrasted with employees, who, unlike the Grievor, worked in the Senior Health Centre, and were faced with a pop-up which stated they "MUST self-isolate for a minimum o[f] 5 days" when they completed the same online screening questionnaire the Grievor had.

The Arbitrator also rejected the Union's argument that the Toronto Public Health authority's instructions to stay home & self-isolate following a positive test for COVID-19 constituted a requirement for the Grievor to quarantine within the meaning of the collective agreement. Arbitrator Kaplan concluded that this only constituted "guidance" and was not an enforceable legal direction or requirement for the Grievor to self-isolate. Accordingly, the Grievor was not entitled to communicable disease paid leave.

Key Takeaways

North York General Hospital provides key clarity on what exactly it means for a person to be "required" to self-isolate, triggering entitlement to paid leave. A mere direction or "instruction" may not be enough to trigger paid isolation leave. Rather, there must be an enforceable, mandatory, and express direction to self-isolate.

Note: *The information contained in this Newsletter is not intended to constitute legal advice. If you have any questions concerning any particular fact situation, we invite you to contact one of our lawyers.*

CaleyWray is recognized as one of Ontario's and Canada's leading labour law firms representing trade unions and their members, with a record of providing quality service for over 50 years.

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